Supreme Court, U.S.
FILED
JUL 18 2006
OFFICE OF THE CLERK

06-93

No. _____

IN THE

Supreme Court of the United States

KATHY M. HANCOCK,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOEL EDELMAN *
Attorney at Law
1135 Makawao Avenue
Suite 204
Makawao, HI 96768
(808) 573-0838

* Counsel of Record

July 18, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

THE QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from the Merit System Protection Board (hereinafter "MSPB"), as to call for an exercise of the Supreme Court's supervisory powers in all of the following respects:

i. Whether, under the circumstances of this case, the Administrative Judge's ("AJ's") wholesale exclusion of the overwhelming majority of Dr. Hancock's proposed witnesses is such an egregious breach of her procedural due process rights such as to require the Supreme Court to act?

ii. Whether the AJ's end-of-hearing denial of any rebuttal testimony by Dr. Hancock's witnesses is such an egregious breach of Dr. Hancock's procedural due process rights such as to require the Supreme Court to act?

iii. Whether the Court of Appeals' clear restatement of Dr. Hancock's procedural due process issues during oral argument obliged the Court of Appeals to address those issues in a written Opinion?

iv. Under the circumstances of this case, whether the Court of Appeals' invoking of Federal Circuit Rule 36 amounts to avoiding or neglecting the Court of Appeals' responsibility to provide a reasonable basis for its ultimate decision?

v. Whether, under the circumstances of this case, Dr. Hancock's right of appeal is effectively undermined when she is left in a position of having to speculate or guess the basis for the Court's judgment?

vi. Whether the government's numerous misstatements of fact to the Court of Appeals in oral argument and in their brief are so egregious as to call for an exercise the Supreme Court's supervisory powers?

vii. Whether, in response to one or more of the above questions, this Court should order a full review of the matter by the Supreme Court, return the matter to the Court of Appeals for rehearing, order preparation of a written Opinion by the Court of Appeals or return the matter to the MSPB for a de novo hearing process?

PARTIES

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	iii
TABLE OF AUTHORITIES	vii
CITATIONS OF OPINIONS AND ORDERS	1
CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT	2
THE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.	2
CONCISE STATEMENT OF THE CASE	3
BRIEF FACTUAL BACKGROUND PRIOR TO THE MATTER COMING TO THE COURT OF APPEALS	3
SUMMARY OF THE ARGUMENT BROUGHT BEFORE THE COURT OF APPEALS	6
BRIEF FACTUAL BACKGROUND AT THE COURT OF APPEALS	6
ORAL ARGUMENT AT THE COURT OF APPEALS	12
SUMMARY	24
CONCLUSION	24
APPENDICES	
A. The AJ's Summary of Telephonic Prehearing Conference of December 6, 2002	1a
B. The AJ's Initial Decision of January 28, 2003, Docket Number SE-315-H-02-0399-I-1, *Kathy M. Hancock v. Department of the Interior*, filed in the United States of America Merit Systems Protection Board, Western Regional Office	3a

TABLE OF CONTENTS—Continued

		Page
C.	The MSPB's Final Order of June 16, 2004, Docket Number SE-315-H-02-0399-I-1, *Kathy M. Hancock v. Department of the Interior*, filed in the United States of America Merit Systems Protection Board, Western Regional Office	16a
D.	The Court of Appeals Judgment of April 5, 2006, Case Number 04-3401, *Kathy M. Hancock v. Department of the Interior*, United States Court of Appeals for the Federal Circuit	18a
E.	The Transcript of the Oral Arguments on April 4, 2006 in the United States Court of Appeals for the Federal Circuit: Pages 1, 11-26	19a
F.	*Corrected opening brief*: Pages 14-17, 20, 31	31a
G.	*Reply Brief*: Pages 11-22	37a
H.	Appellant's Pre-Hearing Submissions dated November 29, 2002: Pages 1-12	48a
I.	Notice of Termination during Probationary Period (Memorandum dated 08-15-2002)	60a
J.	Constitutional Provisions, Statutes, etc	64a
	5 U.S.C. § 7701	64a
	5 U.S.C. § 7702	69a
	5 U.S.C. § 7703	72a
	28 U.S.C. § 2101	74a
	5 C.F.R. § 315.806(d)	75a
	Federal Circuit Rule 36	76a

TABLE OF AUTHORITIES

CASES Page

Chudson v. E.P.A., 17 F.3d 380 (Fed. Cir. 02/22/1994)..... 10, 11

Consolidated Edison Co. Et Al. v. National Labor Relations Board Et Al. FN, 59 S. Ct. 206, 305 U.S. 197 (U.S. 12/05/1938 ..... 10, 11

Schucker v. Federal Deposit Insurance Corporation, 401 F.3d 1347 (Fed. Cir. 03/16/2005)..... 10

STATUTES

5 U.S.C. § 7701 2

5 U.S.C. § 7702 ..... 2, 3

5 U.S.C. § 7703 ..... 2, 3

28 U.S.C. § 2101 2

REGULATIONS

5 C.F.R. § 315.806(d)..... 2, 3

RULES

Federal Circuit Rule 36.....i, 3, 7, 8, 24

IN THE

Supreme Court of the United States

No. __

KATHY M. HANCOCK,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND ORDERS

The AJ's Initial Decision of January 28, 2003 following the administrative hearing: Docket Number SE-315H-02-0399-I-1, *Kathy M. Hancock v. Department of the Interior*, filed in the United States of America Merit Systems Protection Board, Western Regional Office.

The Merit System Protection Board's Final Order of June 16, 2004 following Dr. Hancock's appeal of the Administrative Judge's Initial Decision: Docket Number SE-315H-02-0399-I-1, *Kathy M. Hancock v. Department of the Interior*, filed in the United States of America Merit Systems Protection Board, Western Regional Office.

The United States Court of Appeals for the Federal Circuit's Judgment of April 5, 2006 following oral argument: Case Number 04-3401, *Kathy M. Hancock v. Department of the Interior*, United States Court of Appeals for the Federal Circuit.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Date that Judgment in the Court of Appeals was entered: April 5, 2006.

Not Applicable.

Not Applicable.

Statutory provisions conferring jurisdiction on this Court: 5 U.S.C. § 7703; 28 U.S.C. § 2101.

Not Applicable.

THE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

The MSPB had jurisdiction to hear Dr. Hancock's appeal in accordance with 5 C.F.R. § 315.806(d), 5 U.S.C. § 7702, section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), The First Amendment of the Constitution of the United States, The Fourteenth Amendment of the Constitution of the United States and 5 U.S.C. 7701.

The Appellate Court's jurisdictional basis for judicial review of the MSPB decision can be found in 5 U.S.C. § 7703, in that Hancock was an Agency employee who was adversely affected by the final order of the MSPB.

This appeal was filed in the United States Court of Appeals for the Federal Circuit in accordance with 5 U.S.C. § 7703(b)(1).

The sexual and religious discrimination is subject to 5 U.S.C. § 7702 is filed under 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) and section 16 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as required by 5 U.S.C. § 7703(b)(2).

Under 5 C.F.R. 315.806(d), discrimination based on sex and/or religion may be raised by the Appellant, if Appellant has also raised the marital status jurisdiction matter.

Federal Circuit Rule 36

The text of the above stated provisions is set out in the Appendix referred to in paragraph I below.

CONCISE STATEMENT OF THE CASE

Not Applicable.

See subsection (F) above.

A *Direct and Concise Argument Amplifying the Reasons Relied on for Allowance of the Writ.*

BRIEF FACTUAL BACKGROUND PRIOR TO THE MATTER COMING TO THE COURT OF APPEALS

On August 30, 2002, Dr. Hancock, a non-preference, competitive service employee, who holds a Phd. in Marine Biology from the University of Pennsylvania, was removed during her probationary period from her position as a GS-9 Marine Ecologist at the Kalaupapa National Historical Park (on the island of Molokai, Hawaii, where the remaining long-term Hansen's disease [leprosy] patients reside, hereinafter "Park," or "Agency" or "NPS")—a unit of the United States Department of the Interior. Hancock had appealed her removal, alleging: (1) marital status and other related forms of discrimination and (2) that the relevant facts set forth in the Agency letter of termination are substantially untrue and are

manufactured reasons to mask the true marital status and other discrimination.

During the course of her employment at the Park, Dr. Hancock was supervised by Guy Hughes (hereinafter "Hughes"), himself a probationary supervisor. Hughes was supervised by Park Superintendent Tom Workman (hereinafter "Workman").

Because Dr. Hancock was married and was openly having a sexual relationship with a man other than her husband, Dr. Hancock was discriminated against based on her "marital status". From the beginning, Hughes made it clear that the source of his and Superintendent Workman's problem with Dr. Hancock's and Mark Haskins' (also an NPS employee) was that Dr. Hancock *was married.* That is, Dr. Hancock's supervisors would *not* have had a problem if she *had not been married.*

Hughes, with the open (and tacit) approval of Workman, began to manufacture on-the-job problems that Dr. Hancock was supposedly having. Hughes did this to "cover up" for his and his supervisor's discrimination - - discrimination that was based on what they believed was her offensive outside-of-work "adulterous" relationship.

While Superintendent Workman was critical of Dr. Hancock for openly having this out-of-wedlock personal/sexual relationship with Mark Haskins, Workman was surreptitiously having such a personal/sexual relationship with Jennifer Cerny (hereinafter "Cerny") - - a 27 year younger female contractor. Workman was also resentful of the *openness* of Dr. Hancock's and Haskins' relationship. Cerny later was hired by Superintendent Workman as a full time Cultural Anthropologist at the Park.

Hughes initiated a memo and e-mail "war" against Dr. Hancock and he kept it going for months - - as an unnecessary and intentional provocation to invent "cause" to termi-

nate Dr. Hancock. Hughes' true motivations, and those of his supervisor Workman, were: (a) to punish Dr. Hancock for her open and "immoral" relationship with Haskins, (b) to cover up their own respective improper conduct in taking on (and later hiring) friends/lovers and (c) to cover up their personnel actions in violation of Agency rules and regulations.

Hughes' mother in Connecticut and Hughes had been a friend of Maria Carnevale (hereinafter "Carnevale"), who was first brought to the Park from Connecticut by Hughes as a volunteer. Later, Hughes hired Carnevale as a full time employee - - a Biological Technician (after Hughes actively discouraged the "number one" local Hawaii applicant from taking the job).

The only witnesses called by the government were Superintendent Workman, Cerny (with whom Workman was having a semi-secret affair), supervisor Hughes and Carnevale (the friend of Hughes' mother who lived in Hughes' household part-time and became Hughes' "pet project").

Following Dr. Hancock's termination, she went to Mike McCarten, Director of the Hawaii Department of Health at the Kalaupapa settlement. At Dr. Hancock's request, McCarten had allowed her to become a "volunteer" for the Department. Dr. Hancock's volunteer status allowed her to continue to live at the Park (with Mark Haskins). As soon as Workman and Hughes learned that Dr. Hancock had secured said volunteer position, both Workman and Hughes used their considerable personal and official influence to pressure Mike McCarten to revoke Dr. Hancock's volunteer position.

At the December 2002 administrative hearing, Hughes testified that he was "uncomfortable" with Dr. Hancock being a volunteer at the Department of Health. Therefore, he and Workman wanted McCarten to revoke Dr. Hancock's position. Hughes knew that once Dr. Hancock "lost" her volunteer position, she would have to leave the Park. Such

removal from the Park was just what Workman and Hughes wanted. McCarten went along with Workman and Hughes' wishes; Dr. Hancock was compelled to leave the Park.

Dr. Hancock had an outstanding work and academic record prior to working at the Agency. Dr. Hancock's work performance at the Agency was excellent and gave no cause for termination. Had they been allowed to testify, most all of the Agency and outside witnesses who were rejected by the AJ *could have* testified about Dr. Hancock's excellent work at the Park. But they were *not* allowed to testify.

SUMMARY OF THE ARGUMENT BROUGHT BEFORE THE COURT OF APPEALS

Dr. Hancock's primary arguments were as follows:

- Without just cause, the AJ denied Dr. Hancock's request to have a majority of her proposed witnesses (all of whom had relevant testimony) to testify on her behalf.
- Without just cause, the AJ did not allow Dr. Hancock to present any rebuttal evidence.
- Without just cause, the AJ foreshortened the hearing so as to deny Dr. Hancock the opportunity to adequately cross-examine the Agency's primary witness.
- Without just cause, Dr. Hancock was not allowed to present her newly discovered evidence.

BRIEF FACTUAL BACKGROUND AT THE COURT OF APPEALS

Following the submission of Petitioner's Corrected Opening Brief (August 19, 2005), Respondent's Answering Brief (September 14, 2005) and Petitioner's Amended Reply Brief (December 12, 2005), oral argument was held on April 4, 2006.

During the course of oral argument, there were a considerable number of factual representations made by the government in response to pointed questions from the Judges. Many, if not most, of the government's representations were factually *in*accurate, were false and/or were misleading.

The next day, the unanimous Court issued a Judgment—without an Opinion. The Court's Judgment affirmed the MSPB's decision upholding Dr. Hancock's termination. The Judgment merely cited Federal Circuit Rule 36.

That is, notwithstanding this startling fifteen minute colloquy between the Judges and the government, the Court affirmed the MSPB's decision to uphold the AJ's Initial Decision to terminate Dr. Hancock. Because there was *no explanatory Opinion* provided by the Court, it is impossible for Dr. Hancock (or anyone else) to know the bases for the Court's affirming of Dr. Hancock's termination.

Dr. Hancock believes that said Judgment was based, in large measure, on the false and misleading information proffered by the government in its oral argument and brief.

The Supreme Court "trusts" that the Court of Appeals, in good faith, is carrying out its authority and responsibility to decide matters within its purview.

But what should the Supreme Court do when such "trust" must be "blind?" That is, when the Court of Appeals has *not provided any* legal, factual or other *bases* (other than citing Federal Circuit Rule 36) to even reasonably speculate on "why" the Court of Appeals affirmed a lower Court/Agency decision.

Where is the reasonable balance between the Court of Appeals' legitimate right to "control its workload" versus the legitimate right of a litigant (especially one who has waited four years for her "day in court") to learn the factual and/or legal bases for the Court of Appeals decision?

Yes, under Federal Circuit Rule 36, the Court *may simply cite* said rule in its affirming an administrative agency decision. However, the *application* of said rule must still be subservient to higher legal principles.

The issues raised in Dr. Hancock's appeal were not trivial to her; according to the questions of Chief Judge Michel and Judges Newman and Mayer, these issues were not trivial to the Court. Yet, when "judgment day" came (on the day following oral argument), the Court's judgment was abrupt, without reason and without explanation.

Beyond having to speculate about the reasons for the Court's affirming her termination, Dr. Hancock believes that the Court's decision was due to the government's improper responses to the Judges' clear and pointed question. The government's responses were evasive, confusing, uninformed, misinformed, non-responsive and misleading. Perhaps the evasion, etc. was part of an intentional (and successful) government strategy—to keep the government from *openly* admitting that Dr. Hancock's procedural due process rights were violated (even though there was *no factual basis* for *not* admitting such violations of her rights).

Perhaps that government strategy was sufficient to keep the Court from looking more deeply into whether there truly were factual and legal bases for denying Dr. Hancock the right to call the majority of her proposed witnesses and denying Dr. Hancock the right to present *any* rebuttal evidence.

The AJ initially allowed Dr. Hancock to call "just enough" witnesses to establish the initial fact of marital status discrimination. However, the AJ's arbitrary limitation on witnesses prevented Dr. Hancock from calling enough witness to overcome the evidence that had *not yet* been put on by the government.

After the government put on their evidence of alleged non-pretextual reasons for Dr. Hancock's termination, Dr. Han-

cock was absolutely and totally precluded and forbidden from presenting any rebuttal evidence. Such rebuttal evidence, which had been *requested* in advance by Dr. Hancock (and *approved* in advance by the AJ), would have allowed Dr. Hancock to rebut most of the testimony of the government's four witnesses.

Of the many who had been proposed, the two most knowledgeable individuals who Dr. Hancock should have been allowed to testify as witnesses (either as part of her case-in-chief or in rebuttal) were the following:

a. *Albert Pu*: He was the Park's long-serving Chief of Maintenance. As a supervisor (of equal rank with neophyte/probationary supervisor Hughes), Pu had long and significant experience serving under Superintendent Workman. Pu could have testified concerning Workman's discriminatory personnel policies and practices; the significant differences in treatment between married and unmarried women; Dr. Hancock's excellent professional work at the Park; and the negative effects of Workman's affair with Jennifer Cerny.

b. *Lucy Whiting*: She was the Administrative Officer at the Park—who was responsible for being aware of and processing all personnel matters. Ms. Whiting was prepared to testify to: The real differences in treatment of married versus single women; details of Dr. Hancock's termination that directly contradicted statements made by Superintendent Workman and Supervisor Hughes; and Hughes' admissions concerning the fact of and the real reasons for poor working relationships among Park employees (including the Workman/Hughes—Hancock relationship).

The applicable law, as set forth in several appellate court cases, states that terminated government employee must *first* establish a prima facie case of discrimination; *second*, the government then must establish non-pretextual grounds for

such termination; *thirdly*, Dr. Hancock then has the right to rebut/reply to the government alleged non-pre-textual grounds. *Consolidated Edison Co. Et Al. v. National Labor Relations Board Et Al.* FN, 59 S. Ct. 206, 305 U.S. 197 (U.S. 12/05/1938; *Chudson v. E.P.A.*, 17 F.3d 380 (Fed. Cir. 02/22/1994); *Schucker v. Federal Deposit Insurance Corporation*, 401 F.3d 1347 (Fed. Cir. 03/16/2005).

For Dr. Hancock, such rebuttal/reply was *not* allowed.

During the three pre-hearing telephone conferences, the *fact of* rebuttal and *fact of* Dr. Hancock being allowed to call rebuttal *witnesses* was made clear. That is, *beyond* the law allowing/mandating the right of rebuttal, the AJ acknowledged (*in* advance) *that such rebuttal could take place.*

Unfortunately for Dr. Hancock, when the government had finally concluded its case (after Dr. Hancock's cross-examination had been pre-maturely cut off by the AJ) at approximately 8:00 p.m. on December 12, 2002, the AJ again went "off-the-record." During this last off-the-record colloquy, the AJ tersely announced that the case was concluded; that there would be no rebuttal allowed; that there would be no closing statements; and that the record would be closed.

In this off-the-record discussion, Dr. Hancock's attorney protested all the AJ's announcements. Following such protest, the AJ reluctantly agreed to one modification - - to allow each side to make no more than a five minute closing statement.

The concept of "rebuttal" herein is that once the Agency had concluded the presentation of its case, Dr. Hancock would be provided the opportunity to rebut/reply to the alleged non-pretextual justifications for termination.

The "rebuttal/reply" concept has a long and storied history in Anglo-American law, including in administrative law. Rebuttal by way of presentation of evidence, as well as by

argument, is ingrained in nearly all trial/hearing situations - - civil as well as criminal. For a trial judge or AJ to simply *declare* that there will be "no rebuttal" is arbitrary and capricious. *Chudson*, op. cite.

Furthermore, the fact that Dr. Hancock may have had approximately two days to present her case-in-chief cannot and should not be viewed as a substitute for her opportunity/ right to rebut the new and previously unheard testimony of the government's witnesses.

Even during the Court of Appeals oral argument, Chief Judge Michel, on behalf of the Court, allowed Dr. Hancock time for rebuttal. The widely recognized need for rebuttal during trials and hearings was even allowed during the appeal process - - both in written briefs and in oral argument. Yet, in the only forum in which *testimony* was allowed, and the only forum in which *facts were found*, no such rebuttal was allowed.

The line of cases (including *Chudson*, op. cite, *Consolidated Edison*, op. cite, and *Shucker*, op. cite) were not recognized by the AJ; nor were the dictates of those cases followed by the AJ.

Much of the substance of the testimony presented by the government's witness was *not* known in advance by Dr. Hancock. Although the government's *documents* were known in advance, the precise testimonial justification for the government's position was unknown prior to its presentation.

Yes, the government's witnesses were subject to cross-examination by Dr. Hancock (at least until the AJ prematurely cut short such cross-examination of the government's most important witness - - Supervisor Hughes). But such cross-examination cannot be considered a substitute or equivalent to Petitioner's being allowed to call witnesses *after having heard* the testimony of the government's witnesses.

The failure of the AJ to allow the expected and previously approved rebuttal was totally and completely unjustified, unreasoned, arbitrary and it severely prejudiced Dr. Hancock.

In combination with the AJ's initial arbitrary disallowance of most of Dr. Hancock's most relevant and knowledgeable witnesses, the AJ failure to allow any rebuttal made a mockery of the Federal administrative adjudication process.

ORAL ARGUMENT AT THE COURT OF APPEALS

During the *Hancock* oral argument, Chief Judge Michel and Judges Newman and Mayer asked the government's attorney detailed and pointed questions which called for the government to justify the AJ's denying Dr. Hancock's right to call more than two thirds of her requested witnesses and denying her *any* rebuttal - - both denials appearing to be violations of Dr. Hancock's procedural due process rights.

Not only did the government have no reasonable answers to these many questions, the government had no real factual or legal justifications for these denials of Dr. Hancock's right to present evidence. The government merely put forth guesses, presumptions, and misinformation—but no true facts and no law. The government was essentially "dumbfounded" by most of the Judges' questions. In fact, listeners to the government's answers were left to wonder why the government was unable/unwilling to provide factual justifications; and to wonder whether the "dodging" of the Judge's questions amounted to the government effectively *admitting* that there had been procedural due process violations.

The transcript of the Court of Appeals oral argument is replete with gross misstatements of facts by the government's lawyer. One source of such misstatements was the government lawyer's lack of knowledge of what actually occurred in November and December 2002. Mr. Averbach was not the government's attorney in this matter (until the

appeal arrived at the Federal Circuit Court). He did not appear to know or to understand all that had happened before and during the administrative hearing. His many misstatements were mostly based upon what *he wanted to believe* and what he wanted the Judges to believe (but, in fact, had *not* happened). The government had good reason to know that most of Mr. Averbach's statements were inaccurate and/or misleading.

What follows are some examples of the government's inaccurate and misleading representations during oral argument:

> Judge Michel's second question:
>
> ". . . why was the materiality of the testimony of the three proper (sic) proposed rebuttal witnesses so minimal as to justify their complete exclusion?"

Mr. Averbach replied:

> "Initially, Your Honor, I would like to correct what I believe is a misstatement of Mr. Edelman. The only witness who was actually identified on the record by Mr. Edelman at the time that the hearing closed and Mr. Edelman indicated he wanted to put on rebuttal testimony was his own client. By that point his client had already testified for a substantial period of time and the court had already determined or made an assessment concerning her credibility—"

(*See* Federal Circuit Court transcript of April 4, 2006, in Appendix E, p. 20a)

Mr. Averbach's answer was a "clever" way to completely avoid answering Chief Judge Michel's direct and pointed question.

It is true that Dr. Hancock was the only person *still in the building* (at 8:00 p.m. on Thursday, December 12, 2002) who was available to testify in rebuttal *at that moment*. But it is *not* true that she was the only person that had directly relevant, non-cumulative rebuttal evidence to present. There

were several witnesses who *had been proposed* by Dr. Hancock. In writing and in pre-hearing conference calls, rebuttal witnesses were "approved" - - one was directly "approved" and others were "possible." The fact that "rebuttal" had been approved *in advance* was conveniently ignored by the government's counsel.

By claiming that Dr. Hancock "had already testified" and, therefore, the AJ "had already determined or made an assessment concerning her credibility," the government was knowingly making an outrageous claim. Their statement presumes that the government knows the "state of mind" of the AJ - - that the AJ had already made up her mind AND, therefore, *she did not need to be confused with any more facts*!

Judge Newman pressed the government as to the relevance of what happened *off-the-record.* In response, Mr. Averbach states: "Your Honor, *we don't know* what happened off the record . . ."

This is another clear avoidance - - a non-answer.

When directly challenged by Judge Newman, Mr. Averbach then changed his tune and stated: ". . . I *do* know what happened, but I can represent what is on the record." (*See* Transcript in Appendix E, p. 20a)

Yet another avoidance. It is unclear which of Mr. Averbach's statements *is* accurate—that he "*didn't* know" or that he "*did* know" what happened off-the-record. Based on the many other inaccurate statements he made, it is doubtful that on April 4, 2006 Mr. Averbach actually knew what happened off-the-record on December 12, 2002. (In light of the stance the government took at the Court of Appeals, it would have been "inconvenient" for the government to admit that it knew what had truly happened off-the-record.)

Chief Judge Michel followed up with a question of whether there was:

> ". . . a proffer of what [Dr. Hancock] would say in rebuttal that would meet something that the government's witnesses had said that he had already not previously spoken to herself?"

Mr. Averbach replied:

> "I'm unaware of any such proffer. And Mr. Edelman's brief is devoid of any allegation or any specific fact that would have been alluded to on rebuttal that could conceivable have altered the AJ's decision—" (*See* Transcript in Appendix E, pp. 20a-21a)

Herein, Mr. Averbach *again* side-steps the matter of what actually happened. Off-the-record, the AJ made it clear that she had "heard enough." It was 8:00 p.m. and she did not want to hear any more testimony—by Dr. Hancock, *or anybody else*.

When Chief Judge Michel continued with his question concerning the (wholesale) exclusion of Dr. Hancock's proposed witnesses, Mr. Averbach responded that:

> ". . . according to representation made, were to provide testimony concerning such things as what relationships in and out of work and other romantic relationships some other employees other than Dr. Hancock may have had with either—"

This answer was, at best, a "quarter truth."

When Chief Judge Michel then asked:

> "Were those witnesses excluded on the basis that this litigation was not about romance or illicit affairs but was about professionalism on the job?"

Mr. Averbach replied:

> "Your Honor, that's my understanding. I don't have anything specific to point to, but I am certainly in-

> formed—I can tell you what I know that's not on the record. But there is nothing in the record—" (*See* Transcript in Appendix E, p. 21a)

Here again, Mr. Averbach did not really know ("I don't have anything specific I can point to . . .").

Again, Mr. Averbach *did not* accurately respond to Chief Judge Michel's questions. In significantly misstating the facts, he left himself the "deniability" of "I am informed" and "that's my understanding."

Yes, of the *twenty two witnesses who were excluded* by the AJ, perhaps three would have provided only testimony concerning romantic relationships in and out of work by employees other than Dr. Hancock. Contrary to Mr. Averbach's "understanding" (or what he "was informed), most of the excluded witnesses *were* competent to testify about *professionalism on the job*—Dr. Hancock's professionalism and/or other relevant/comparable employees' professionalism.

As Judge Newman properly pointed out, testimony concerning "other people's romantic relationships, other people's job performance, in and attempt to somehow compare Dr. Hancock's performance was fundamental to her case." Further, Judge Newman stated:

> "How do you show discrimination in Title VII cases? *By comparative treatment. How were others treated? What's the culture, the community.*" (*See* Transcript in Appendix E, p. 23a) (emphasis supplied)

Following a response by Mr. Averbach that *appeared* to agree with Judge Newman (but actually was *dis*agreeing with her), Chief Judge Michel asked:

> "What testimony was admitted about the treatment of other women at that Park, both married and unmarried, so one could draw some inference?" (*See* Transcript in Appendix E, p. 23a)

Out of Mr. Averbach's *admitted* lack of direct knowledge of the marital status of many of the witnesses (and his admitted lack of knowledge of many other factual aspects), he then compounded his misleading the Circuit Court Judges by making additional demonstrably false statements and false inferences:

Following Chief Judge Michel's question, Mr. Averbach responded:

> "One employee about whom Mr. Edelmen suggests his client was not able to provide information did in fact have an opportunity to testify. That was Jennifer Surning (sic). And she was in fact permitted to testify on behalf of Dr. Hancock."

Mr. Averbach's response "appears" to be accurate, as far as it goes. Yes, Ms. Cerny testified and so did Ms. Carnevale. But *no other* of Dr. Hancock's proposed witnesses (other than Dr. Hancock herself) were allowed to testify concerning *how differently Ms. Cerny and Ms. Carnevale (both single women) were treated than Dr. Hancock and another married woman were treated.*

Mr. Averbach *avoided* providing that comparative information under the cover of claiming "not to know" some of the most important facts of this case and again failing to directly answer Chief Judge Michel's questions.

Chief Judge Michel asked:

> "Okay. And now, were there married women whose experiences with allegedly harsh treatment to compare with the single women? I mean, you have to show that there is some different treatment, so you have to look at one or more examples on the married side and on the single side or you don't have anything to compare."

Mr. Averbach: Your Honor, I don't know the marital status of each of the witnesses who in fact testified, but—(*See* Transcript in Appendix E, p. 24a)

Here again the government is effectively evading, avoiding and otherwise not responding to yet another flaw in the administrative hearing - - that the AJ systematically excluded all witnesses who could have given relevant and first-hand testimony directed to the very issue raised by both Chief Judge Michel and Judge Newman.

Judge Mayer intervenes:

> "Well, were they having an affair, whether they were married or not, with someone they were supposed to investigate the background of and make a recommendation to hire for the agency? . . .
>
> "In this situation, the woman was supposed to look into his background, the guy she was having an affair with, and she was recommending him for appointment, and he had a deficient background, right?"

Mr. Averbach: That's correct, Your Honor. (Transcript in Appendix, p. 24a)

In making that reply, the government was grossly misleading the Court in several important respects - - and Mr. Averbach had good reason to know that.

First, The "guy" had been a Park employee for five years (as a High Voltage Electrician). He also happened to be the strongest and most experienced swimmer at the Park. Dr. Hancock had been asked to recommend people who were already on the staff - - people who might be willing to volunteer to be on the "dive team". No one was being "hired." There was no obligation for Dr. Hancock to investigate anyone's background - - other than their potential ability as a scuba diver and as a member of the dive team.

As someone who was expected to be intimately familiar with the facts of the case, Mr. Averybach was expected to know this. And if he did not know it, he should not have answered the question the way he did. The government's

answer contained two important assertions, both of which were knowingly false:

1. That Dr. Hancock was supposed to investigate and make a "recommendation to hire" him to the agency.
2. This "guy" had a "deficient background"

There was no evidence presented at the hearing that Mark Haskins had a deficient background. In a memo to Dr. Hancock, Hughes made a *hearsay* assertion that Haskins did not have good judgment. Hughes did not have enough direct personal experience with Haskins to make such a non-hearsay assertion and have it considered to be credible. The "story" that Haskins had a "deficient background" was just that—a story with nothing credible in the record to back it up. There was *no* AJ finding that Haskins was deficient in any way.

At least Judge Mayer (and probably all the Judges) believed Mr. Averbach's false and misleading "factual" assertions.

It continues.

Judge Mayer: "So whether they were married or not, did any of these other women have a situation like that, where there is performance going directly—"

Mr. Averbach: . . . "There is nothing in the record to suggest a meaningful basis for comparison to the unique circumstances of this particular case."

Judge Mayer: "Then it wouldn't be relevant, would it?"

Mr. Averbach: "It would not, Your Honor." (*See* Transcript in Appendix, p. 24a)

Shortly before this exchange, Mr. Averbach was unable to demonstrate that he had reliable information about relevant happenings prior to and during the hearing. Now, he claims enough knowledge to "pander" to Judge Mayer's obvious MISunderstanding of the facts.

Chief Judge Michel then confronts Mr. Averbach with the idea that perhaps "no witnesses should have been called." Mr. Averbach's non-answer was interrupted by Chief Judge Michel, who returned to the heart of an underlying issue on appeal - - should the hearing have had a fourth day in which Dr. Hancock could put on rebuttal witnesses?

Chief Judge Michel then asked Mr. Averbach: ". . . what would make it look premature or what would make it look not premature?" Mr. Averbach responded by making the outrageously false claim (on *Dr. Hancock's behalf*) that there is not:

> ". . . a single fact that would have suggested from any witness whose testimony was excluded that would have in any way undermined the ALJ's conclusion.
>
> "Nowhere in his brief, nowhere in the record is there any evidence that Mr. Edelman has ever raised that suggests that the case would have somehow been different or whether the ALJ's conclusion would somehow—or even—" (Transcript, Appendix E, p. 25a)

When Mr. Averbach made that statement, perhaps he had conveniently "forgotten" Dr. Hancock's Corrected Opening Brief (*Corrected Opening Brief*: in Appendix F, pp. 32a-34a), her Reply Brief (*Reply Brief*: in Appendix G, pp. 38a-47a) and that part of the record that included the November 29, 2002 written (and oral) pre-hearing justifications that were submitted to the AJ for each and every requested witness (Appellant's Pre-Hearing Submissions dated November 29, 2002). (*See* Appendix H, pp. 48-59)

Chief Judge Michel followed up by seeking Mr. Averbach's response to the concept that: "even if some witnesses were excluded, there was no harm to the case of Dr. Hancock."

Mr. Averbach responded that ". . . we're certainly arguing that there was no harm." (Transcript, Appendix E, p. 26a)

The government's bold assertion was not (and could not be) buttressed by any facts because the assertion is demonstrably untrue. The harm and prejudice to Dr. Hancock is obvious and overwhelming. She could have called witnesses who would have testified to at least the following:

1. Superintendent Workman had a history of discrimination against married women.
2. Workman "set up" Dr. Hancock to fail during her probationary period.
3. The two single women supervised by Hughes were Cerny (Workman's not-so-secret lover) and Carnevale (Hughes' and Hughes' mother's long-time family friend). The record demonstrates that both these single women were treated much more favorably than Dr. Hancock was treated.
4. Cerny and Carnevale were appropriate comparisons for assessing the differences in the treatment between single and married women.

For the government to unequivocally state that the AJ's disallowance of this kind of testimony was "no harm . . . to Dr. Hancock" is as big and obvious a lie as could be told to the Court of Appeals.

The Colloquy proceeded:

> Chief Judge Michel: "There is no complaint that the burden was shifted from her to the government. The complaint is that in ruling that the government successfully carried that burden, there were undue restrictions on the scope of witnesses on behalf of Dr. Hancock.
>
> "Judge Newman suggested, I thought, that really it should be drawn just where you would draw it in a Title VII case because discrimination is at the heart of it. I just want to know whether you agree with that or you don't agree with that."

> Mr. Averbach: "I do, Your Honor, although I think—and I have an 'although."
>
> "Title VII is somewhat different in that the question of whether or not someone was terminated or retaliated against because of their gender is not necessarily the same issue as whether or not they were terminated because of their marital status." (Transcript, Appendix E, p. 27a)

In other words, the government *admits* that the applicable standard for allowing Dr. Hancock to introduce evidence of marital status discrimination should be essentially the same as the standard as allowed in Title VII cases.

Clearly, in Dr. Hancock's case, the AJ was *not guided by the Title VII standard*; the AJ used a standard that was a great deal narrower - - so narrow that hardly anyone passed through this ultrafine "witness filter" that the AJ arbitrarily imposed for Dr. Hancock's witnesses.

Near the end of Mr. Averbach's allotted argument time, Judge Mayer stated:

> "*She was removed because they didn't care for her morals, her morality.* They said *it was disruptive*, they said it was improper, and they didn't like it.
>
> "She sought to introduce evidence that here in Hawaii, this is how people behave, that things are looser, supervisors were having affairs with unmarried women.
>
> "So that was what, as I understood it, she was trying to continue to establish and to establish on rebuttal. And to me the question—the fundamental question, which I didn't really see anyone arguing, is in fact removal on moral grounds. . ."

Mr. Averbach replied: "Your Honor, *I believe that the question of morality*, to the extent it's been raised here, *is identical to the question of marital status discrimination.*" (*See* Transcript Appendix E, pp.27a-28a) (emphasis supplied.)

Herein, the government *admits* that dismissal on "moral grounds" is equivalent to dismissal on "marital status" grounds.

If the AJ had properly used the Title VII standard for allowing witness testimony (as the government essentially conceded during oral argument), many more of Dr. Hancock's witnesses would have (and should have) been allowed to testify - - both in Dr. Hancock's case-in-chief and on rebuttal.

Listening to the government's misrepresentations of facts was disturbing; reading and studying the transcript of the hearing is revolting.

It is astounding that our government believes it is necessary, or even appropriate, to misrepresent (knowingly or otherwise).

This case is deeply meaningful to Dr. Hancock (and to Mr. Haskins). It is beyond objective comprehension that the government would resort to such tactics in this "procedural due process" appeal.

Dr. Hancock and the three Federal Circuit Judges clearly and directly wanted the government to attempt to justify what appeared to be significant restrictions on her right to present evidence.

Now, in addition to the issues initially brought to the Court of Appeals, Dr. Hancock has another set of issues - - the government's misrepresentations.

Apparently, the Judges believed the government's misrepresentations; therefore, the Court simply affirmed the MSPB's termination of Dr. Hancock.

For all of the above stated facts and reasons, Dr. Hancock respectfully requests that the Supreme Court intervene in this matter.

SUMMARY

Without just cause and in violation of her procedural due process rights, the AJ denied Dr. Hancock's request to have most of her proposed witnesses testify. Most of Dr. Hancock's proposed witnesses would have testified to facts that were relevant and non-cumulative and that were directly contrary to the testimony of the government's witnesses.

Without just cause and in violation of her procedural due process rights, the AJ did not allow Dr. Hancock to present any rebuttal evidence.

The government mislead the Court of Appeals. The misleading took place during oral argument, as well as in the government's Answering Brief. Such misleading goes to the heart of Dr. Hancock's factual and legal contentions. The Court apparently believed and acted upon the government's *in*accurate and *mis*leading information.

There was no written Opinion. If there had been such a reasoned Opinion, the factual and legal bases for the Court of Appeals Opinion would have been clear - - and would have been bases for a request for reconsideration or other review process.

The Court of Appeals' use of Federal Circuit Rule 36 (to affirm the MSPB's decision) places Dr. Hancock in a difficult position. It also places the Court of Appeals and the Supreme Court in a difficult position.

CONCLUSION

Dr. Hancock respectfully requests that the Supreme Court take one of the following actions:

a. Return the case to the Merit System Protection Board with instructions to hold a new hearing process on the legitimacy of Dr. Hancock's termination from her position as a Marine Ecologist at the Kalaupapa National Historical Park.

b. Return the case to the Court of Appeals, with instructions to draft a written Opinion that sets forth the factual and legal bases for its decision.

c. Grant Certiorari to review the April 5, 2006 Decision of the Court of Appeals.

Respectfully submitted,

JOEL EDELMAN *
Attorney at Law
1135 Makawao Avenue
Suite 204
Makawao, HI 96768
(808) 573-0838

* Counsel of Record

July 18, 2006

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

[Filed: December 6, 2002]

DOCKET NUMBER SE-315H-02-0399-I-1

KATHY M. HANCOCK,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

SUMMARY OF TELEPHONIC PREHEARING CONFERENCE

On December 2, 2002, a telephonic prehearing conference was held with the parties of record. The representatives of record informed the undersigned that the parties had discussed alternate resolution of the appeal but an agreement could not be reached.

The appellant raised an allegation of marital status discrimination in her petition for appeal as the basis for her termination during her probationary period. The parties were advised that the appellant has the burden of establishing her claim by a preponderance of the evidence and thus establish that the Board has jurisdiction over her appeal.

During the discussion regarding the appellant's proposed witnesses, the appellant's representative made known that he had not personally spoken with a majority of the requested witnesses to confirm the nature of their testimony. The appellant's representative was advised that the witnesses would,

not be approved unless he confirmed the relevancy of their testimony. The following witnesses were approved for the agency: Kathy Hancock, Guy Hughes, Tom Workman, Jennifer Cerny and Marie Carnevale.

The prehearing conference was continued to December 4, 2002 to afford the appellant's representative an opportunity to contact the proposed witnesses. The following witnesses were approved for the appellant: Larry Basch, Jennifer Cerny, Lester Delos, Tasja Ebersol, Kathy Hancock, Mark Haskins, Ivy Kahilihiwa, Dr. Dan McGuire, and Gene Sheppeard as a rebuttal witness. Subpoenas were issued for non-agency witnesses. The undersigned agreed to allow the appellant's representative more time to contact six additional witnesses and to conduct another prehearing conference on December 6, 2002, to finalize the witness list.

During the telephonic conference on December 6, 2002, the following additional witness was approved for the appellant: Lea Scow.

The hearing in this appeal will be held on December 10 and 11, 2002, at 9:00 a.m., at the Federal Building, 300 Ala Moana Boulevard, Room 5-161, Honolulu, Hawaii.

FOR THE BOARD: /s/ Virginia M. Campos
for LuNell C. Anderson
Administrative Judge

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

[Filed January 28, 2003]

DOCKET NUMBER SE-315H-02-0399-I-1

KATHY M. HANCOCK,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

Jōel Edelman, Esquire, Makawao, Maui, Hawaii, for the appellant.

Karen D. Glasgow, Esquire, Oakland, California, for the agency.

BEFORE
LuNell C. Anderson
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the agency action terminating her from the position of Ecologist (Marine), GS-0408-09, effective August 30, 2002. The appellant was serving a probationary period at the time of her termination. A jurisdictional hearing was held in this matter from December 11 through 13, 2002.

For the reasons stated below, the appeal is DISMISSED for lack of Board appellate jurisdiction.

ANALYSIS AND FINDINGS

Jurisdiction

The statutory rights of appeal to the Board for employees who have been removed from positions in the Federal Civil Service are set forth at 5 U.S.C. §§ 7511-7513 and 4303. Employees serving a probationary period under an initial appointment are specifically excluded from coverage. 5 U.S.C. §§ 7511(a)(1)(A) and 4303(f)(2). The undisputed record evidence establishes that the appellant was appointed to the position of Ecologist (Marine) on January 13, 2002, under a career-conditional appointment to the competitive service. The appellant's appointment was subject to the completion of a one-year probationary period beginning the same day. Agency File, Tab 4m. On August 30, 2002, less than one year later, the appellant was terminated for post-employment reasons. Agency File, Tab 4b. At the time of her termination, the appellant had not completed the probationary period and, she has no statutory right of appeal.

However, probationary employees terminated for post-employment reasons do have a limited right of appeal to the Board under 5 C.F.R. § 315.806, Specifically, that right is limited to those cases in which the appellant presents a nonfrivolous allegation that the termination was based on partisan political reasons or marital status discrimination. *Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420, 422 (1987), *aff'd*, 837 F.2d 1098 (Fed: Cir. 1987) (Table). In this appeal, the appellant alleges that her termination was based on marital status discrimination.

Burden of Proof

The probationary employee bears the burden of establishing jurisdiction. *Stern v. Department of the Army*, 699 F.2d

1312 (Fed. Cir. 1983), *cert. denied*, 462 U.S. 1122 (1983). That burden is not met upon the mere filing of allegations. To carry her burden of establishing jurisdiction, the probationary employee must proffer sufficient evidence to enable the administrative judge to conclude that the allegations are non-frivolous, i.e., a showing which, if not controverted, would indicate that partisan politics or marital status discrimination was the basis for the agency's action. *Stokes, v. Federal Aviation Administration*, 761 F.2d 682, 685-86 (Fed. Cir. 1985).

Thus, the appellant faces initially a two-step process. She must first include in her appeal allegations of marital status discrimination supported by factual assertions indicating that the allegations are not a *pro forma* pleading. If this is done, the appellant then has a right to a jurisdictional hearing. At the hearing, the appellant must present evidence to support her allegations with a showing of facts, which would, if not controverted, require a finding that marital status discrimination was the basis for her termination.

Once the appellant has made the required showing, the agency must refute the showing by attacking its truth or by establishing a non-discriminatory basis for its termination action, or both. If the agency successfully controverts the factual showing made in support of the appellant's jurisdictional allegations, then the Board lacks the requisite appellate jurisdiction over the appeal. *Stokes* at 686.

Background

In September 2001, Guy Hughes, Wildlife Biologist and Division Chief of Natural Resources Management offered the appellant the position of Ecologist at Kaluapapa National Historical Park. The appellant accepted the position and began work on January 13, 2002. The appellant's work site was located at Kalaupapa National Historical Park on the Island of Molokai (Park). The Superintendent of the Park was Thomas Workman.

The Park is the home for many surviving Hansen's disease patients, generally referred to as "the patients." The Park contains one of the least disturbed archaeological preserves in Hawaii. The National Park Service manages the Park through several cooperative agreements with the Federal Government, the State of Hawaii and the local community. Many of the policies regarding the Park's operation are left to the choice and discretion of the Patient Advisory Council. Decisions made by the Patient Advisory Council include whether the National Park Service would be allowed to conduct dives off the Kalaupapa shores to monitor and inventory the coral reefs. All non-residents and non-employees must have a permit to enter the Park and no child under the age of 16 years is allowed. The agency attempted on two previous occasions to receive permission from the Patient Advisory Council to have a Dive Program in the Park and it was not until April 2001 that the Patient Advisory Council finally agreed to a two-year contract.

When the appellant first arrived at the Park, her husband Todd Hancock, accompanied her. Mr. Hancock signed in as a volunteer at the Park so he could remain overnight at the Park. During the two weeks he was at the Park, Mr. Hancock was introduced to many of the other residents and he provided computer software assistance to the National Park Service on a volunteer basis, Although in the history of the Park a husband and wife had never worked together, the possibility of a position becoming available in March that would create such a' situation was discussed with Mr. Hughes. Briefly after Mr. Hancock's departure, the appellant began a personal relationship with an employee who also worked for the agency. It is the appellant's position that her termination during her probationary period was the result of marital status discrimination, because she was a married woman having a personal relationship with a man other than her husband.

The agency established non-discriminatory reasons for the appellant's termination.

To prevail on a claim of marital status discrimination, the allegations of discrimination must go to the essence of the appellant's marital status. In this case, the appellant made factual allegations to support a jurisdictional hearing. I also find that the appellant supported her allegations with a showing of facts that would, if not controverted, support a finding of marital status discrimination.

As the basis for her claim of marital discrimination, the appellant recounted a conversation she had with Mr. Workman. The appellant testified that early one morning in mid-March while sitting at her desk in the office, Mr. Workman approached her and said, "I'm not here to dictate morality to you, but your relationship with Mark is going to endanger the dive program in the patient's eyes. You know that we are on a two year—they gave us a two-year approval on a trial basis and that trial period is coming due." The appellant stated that she did not make a record of this conversation and that her only response to Mr. Workman was that she thought the contract was for two years. The appellant further testified that Mr. Workman had never spoken to her directly about her relationship with Mr. Haskins and this was the first time he spoke to her about the Dive Program and Mr. Haskins. The appellant stated that she felt like her privacy was invaded and that her off-duty relationship and behavior was being used to judge her work performance and ability to do her job. When she informed Mr. Haskins about this conversation he told her that Mr. Workman had come to his home and gave him a similar lecture. The appellant admitted that she did not ask Mr. Workman why or how her relationship with Mr. Haskins could impact the dive program. The appellant further claimed that Mr. Hughes was aware of this conversation and was aware that Mr. Workman stated that the patient community had concerns about her relationship with Mr. Haskins.

In further support of her claim that marital status discrimination was the basis for her termination, the appellant proffered the testimonies of Ivy Kahilihiwa,[1] Gloria Marks, Larry Basch, Tasja Ebersole and Mark Haskins.

Gloria Marks, a patient for 30 years and chairperson for the Patient Advisory Council, testified that an employee named Lucy Whiting, told her that her name and the Patient Advisory Council name was mentioned in connection with the appellant's termination. However, Ms. Whiting did not tell her the context in which they were used. The statement made by Ms. Whiting upset her because no one on the Council was upset and what the appellant did after hours was her own business. Ms. Marks also stated that there were no meetings or discussions regarding the appellant or her lifestyle. Ms. Marks confirmed that the Patient Advisory Council did have the final decision regarding the continuation of the Dive Project and no discussion had taken place about canceling the contract. Their permission given to carry out the Dive Project and related studies would continue as long as the agency followed the Council's policies. Ms. Marks further testified that Mr. Workman never said anything to her about the appellant's lifestyle upsetting the patients. She was aware that one patient was upset but that patient was not on the Patient Advisory Council.

Larry Basch, Senior Scientist Advisor and Marine Ecologist with the Pacific Island Coral Reef Program, testified that based on his contacts with the appellant he thought she carried herself very professionally. Mr. Basch recalled that the appellant did mention her relationship with Mr.. Haskins to him and expressed that she was upset about going through a divorce. The appellant also expressed in May 2002, that she was having difficulties with her supervisors.

---

[1] This witness provided no relevant testimony.

Tasja Ebersole, a Volunteer for the National Park Service, testified she worked in the office of Mr. Workman and under his supervision. Ms. Ebersole stated that Tom Workman did comment that the patient community was complaining about the relationship between the appellant and Mark Haskins and he was unhappy about this because of the potential impact on the Dive program. His vague comments were made to her beginning in February and continuing until April.

Mark Haskins, a High Voltage Electrician, stated that he has been working for the agency for five years and previously with the Department of Defense Marine Base for four years. Mr. Haskins testified that he had a friendly relationship with Mr. Workman who would visit him, but since his relationship with the appellant began, he stopped coming by his house. Mr. Haskins further testified that Mr. Workman mentioned the patient community was upset and told him that the relationship could jeopardize the Dive Program. Mr. Haskins also stated that Mr. Workman was upset over his use of the State maintenance vehicle and went to the State Superintendent to complain about this. Mr. Haskins further alleged that Mr. Workman refused to send him to wildlife fire training, seasonal volunteer fire duty and other training opportunities because of his relationship with the appellant. Mr. Haskins claimed that he and Mr. Workman had no problems prior to his relationship with the appellant.

Contrary to the appellant's assertions, Mr. Workman adamantly denied that he discriminated against the appellant on the basis of her marital status or on the basis of her relationship with Mr. Haskins. Mr. Workman recounted that he heard comments and jokes about the appellant's relationship with Mr. Haskins in the community and was concerned that the dive program could be affected. Mr. Workman admitted that he spoke to the appellant only because he wanted her to be aware of the power that the patients had over the existence of the dive program and that it could be stopped

by the Patient Advisory Council for any reason. The appellant was a new employee and was probably going to be the Park Dive Officer (PDO) so she needed to be careful.

Mr. Workman testified that Mr. Hughes had recommended the appellant to be the PDO and as the Superintendent, he was required to approve both the dive plan and the PDO. Mr. Workman stated that he later decided not to name the appellant as the PDO, in part, because of the communication she sent to Mr. Basch, including those who were copied, inferring that he was holding up the dive plan and the misinformation that Kalaupapa was seeking to dive under the Arizona Dive Plan. Agency File, Tab 4d and Appellant Hearing Exhibit SSSS. Mr. Workman felt that the appellant was not ready to be the PDO because she apparently did not understand the protocol that involved keeping him updated with any information regarding the dive plan and potential dive team members.

Mr. Workman further testified that Mr. Hughes made the decision to terminate the appellant during her probationary period and that he played no role in that decision. Mr. Workman recalled that Mr. Hughes advised him in June or July that he was having some difficulties with the appellant and that in August that he became aware that Mr. Hughes was in the process of terminating her.

Mr. Hughes stated that after he hired the appellant and she reported for duty, they discussed her performance plan, which she signed on February 5, 2002. Agency File, Tab 4k-2. He also provided her with a list of goals and tasks he envisioned for her and asked her to come up with a final list for herself. Agency File, Tab 4n. Mr. Hughes testified about the concerns he raised with the appellant during his evaluation of her performance on April 5, 2002, regarding her work performance and her decisions involving aspects of the dive program. Agency Hearing Exhibit 1. Mr. Hughes also testified that he

seriously questioned her objectivity and honesty and found that other employees shared his concerns.

Mr. Hughes referenced the many e-mail exchanges between he and the appellant as examples of her poor judgment, negative attitude at work, failure to communicate with her supervisors and the resulting unpleasant working environment for the employees and volunteers. Agency Hearing Exhibits 1-8, 10, 12 and 15. Mr. Hughes further testified about the discussions he had with the appellant on April 5, 2002, and May 22, 2002, regarding her performance and his follow-up memorandums, pointing out his concerns for her operating outside of the supervisory framework and communication channels.

Finally, Mr. Hughes testified that he consulted with Lea Scow of Human Resources for advice and guidance regarding his concerns, about the appellant. Ms. Scow, Human Resources Specialist for the Park Service Pacific Island Support Office, testified that she first spoke to Mr. Hughes about his concerns with the appellant in April 2002. She gave Mr. Hughes general advise such as setting up meetings and putting his concerns in writing to clearly communicate his expectations to the appellant. Ms. Scow further testified that Mr. Hughes sent her drafts and e-mails regarding the matter and as an advisor to management on personnel matters, she saw sufficient documentation to support the action. Also, she did not perceive or observe an issue of discrimination or she would have questioned Mr. Hughes about it.

Marie Carnevale, a Volunteer for Natural Resources testified about her concerns with safety issues in the Opihi work that she raised with the appellant and about a memorandum she sent to Mr. Hughes and the appellant about her concerns on June 17, 2002. Agency Hearing Exhibit 9. Ms. Carnevale also testified that she was surprised when the appellant stated that she did not know she was her supervisor, because up until that point the appellant had assigned her work to do on

a regular basis, signed off on her stipend for food and assigned her the Monk Seal survey. Ms. Carnevale stated that the appellant did not communicate well with her and that she felt phased-out of projects that were going on. Finally, Ms. Carnevale claimed that the appellant created an unpleasant working environment by reading memorandums she had received from Mr. Hughes aloud to Ms. Ebersole and then mocking him in her presence.

Jennifer Cerny, a Cultural Anthropologist, testified that she expressed concern about her interactions with the appellant and that she found her to be unpleasant, difficult to work with and dishonest. Ms. Cerny stated that she addressed her concerns regarding the VIP Quarters in a series of memorandums beginning July 12, 2002, and ending on August 26, 2002. Agency Hearing Exhibit 14. Ms. Cerny claimed that although the appellant chaired the VIP committee meeting, had the keys to the supply locker and controlled the scheduling board, she did not participate in the teamwork efforts to keep the program running smoothly.

The appellant acknowledged that there were issues raised by Mr. Hughes in her performance review discussions and in her termination letter. For example, the appellant was questioned regarding why the agency was billed for the scuba physical for Mr. Haskins; why she recommended that Mr. Haskins be approved to attend the Blue Card certification training with no prior discussion of the matter; and why Mr. Haskins requested to be the Park Water Safety Officer after he informed her that he could not be on the dive team. Mr. Hughes indicated that these were examples where the appellant showed poor judgment and operated outside of the supervisory framework.

Daniel McGuire, M.D., testified he gave Mark Haskins a scuba physical on February, 5, 2002. At the time of Mr. Haskins physical, Dr. McGuire claimed he was told that other people would also be coming to get scuba physicals. He

assumed all the exams were for the Park so he billed all the physicals to the National Park Service. Dr. McGuire maintained that neither the appellant nor Mr. Haskins asked that the agency be billed for the physicals and that the error was his. Dr. McGuire also testified that Mr. Haskins did not say how his examination bill would be paid and he does not recall asking Mr. Haskins about how he would pay his bill. He also claimed that the reason for the long delay before billing for Mr. Haskins' physical was because he does not always send out bills immediately. Dr. McGuire further testified that when he spoke to the appellant about payment for her physical given on March 28, 2002, she told him to bill the agency. He assumed that all the scuba physicals were to be billed to the agency.

I do not find the testimony of Dr. McGuire credible regarding why he billed the agency for Mr. Haskins' scuba physical. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Mr. Haskins' examination was completed on February 5, 2002, well before the appellant made any arrangement for her and Mr. Hughes' physical. Also, Mr. Haskins testified that he told Dr. McGuire that his private insurance should be billed for his physical. Further, the health insurance form completed by Dr. McGuire indicated that Mr. Haskins' physical was done on March 28, 2002, the same day as the appellant's was completed. Appellant Exhibit J. The content of this document casts doubt on Dr. McGuire's testimony that he assumed all physical were to be billed to the agency although no one purportedly told him this. The appellant acknowledged that she made the arrangements to use Dr. McGuire for the scuba physicals at the suggestion of Mr. Haskins and that she told Dr. McGuire to bill the agency. How Dr. McGuire would assume that all the physicals would be billed to the agency remains unclear.

After carefully reviewing all the pertinent evidence, I find that the appellant has failed to meet her burden of establishing

that her termination during her probationary period was based on marital status discrimination. Essential to such a finding is a showing of a difference in treatment of married and unmarried employees. The appellant has failed to establish that Mr. Hughes treated her any differently than unmarried employees. I further find that Mr. Hughes clearly articulated his reasons for terminating the appellant during her probationary period.

Mr. Hughes credibly testified about the contentious exchanges he had with the appellant and the unproductive effects these communications had in the workplace. *Hillen* at 458. Some of the reasons for the appellant's termination cited by Mr. Hughes included the exercise of poor judgment, a negative attitude at work resulting in an uncomfortable working environment for others, negative communications in memorandums and e-mails and the need for his continual intervention and follow-up in work related matters. Mr. Hughes stated that the situation required a great deal of his attention, time and intervention, which adversely impacted his productivity as well as the appellant's. I find that Mr. Hughes' testimony about his stated, concerns regarding the appellant's performance is supported by the documentary evidence of record and by the appellant's own acknowledgment of their poor communications as is evident in the various e-mails messages she sent to Mr. Hughes.

Finally, Mr. Hughes showed that he followed the normal procedures in terminating the appellant's employment by communicating with Human Resources for advice and guidance.

I find that the appellant has presented no evidence to establish that the actions of Mr. Hughes were motivated by marital status discrimination. The assertions made by Mr. Hughes to support his decision to terminate the appellant and all reference situations and disputes over work-related matters are completely unrelated to her marital status. I also find that

the appellant has failed to establish that Mr. Hughes stated reasons for her termination were pretextual. In fact, the appellant's own e-mails substantiated a break down in communications with her supervisor.

I also find that the appellant has failed to show that the comments made by Mr. Workman regarding his concern for the Dive Program establish that her termination was based on marital status discrimination. The appellant has not shown that Mr. Workman asked any questions about their relationship but solely commented about his concerns that the Dive Program could be impacted since the Patient Advisory Council had the final say about the program and he wanted her to be aware of this. Ms. Marks acknowledged that she was aware of one complaint but stated the person was not a member or the Patient Advisory Council. Both the appellant and Mr. Haskins testified that they did not, in any way, try to hide their relationship from anyone. Finally, Mr. Hughes testified that it was his decision, alone to terminate the appellant during her probationary period and that he sought the direction and advice only from Human Resources.

Accordingly, I find that the agency has refuted the appellant's allegation of marital status discrimination by clearly establishing a non-discriminatory basis for the appellant's termination and that the appellant has failed to show that the stated reasons are pretextual.

DECISION

The appeal is DISMISSED.

FOR THE BOARD /s/ LuNell C. Anderson
LUNELL C. ANDERSON
Administrative Judge

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[Filed June 16, 2004]

DOCKET NUMBER SE-315H-02-0399-I-1

KATHY M. HANCOCK,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ [Illegible]
for Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Apr. 5, 2006]

04-3401

KATHY M. HANCOCK,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECITON BOARD.

In CASE NO(S). SE315H020399-l-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED.

Per Curiam: (MICHEL, *Chief Judge*, NEWMAN and MAYER, *Circuit Judges*:

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBALY, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CASE NO.: 04-3401

KATHY M. HANCOCK,
Petitioner,

VS.

DEPARTMENT OF THE INTERIOR,
Respondent.

APPEAL HEARING
FROM THE MERIT SYSTEMS PROTECTION BOARD

* * * *

[11] the person, the claimant, Dr. Hancock in this case, gets an opportunity to put on further evidence showing that, yes, there was in fact discrimination in a way of rebutting what the government has put on. But we never got that opportunity.

CHIEF JUDGE MICHEL: Mr. Edelman, you're down to two minutes of rebuttal. Do you want to reserve the rest of time—

MR. EDELMAN: Yes, I do, Your Honor.

CHIEF JUDGE MICHEL: Thank you kindly. Mr. Averbach? Would you address first the exclusion of all rebuttal witnesses.

MR. AVERBACH: Certainly, Your Honor. As an initial matter, the relevant inquiry for the courts is whether or not the refusal to hear rebuttal testimony was an abuse of discretion and—

CHIEF JUDGE MICHEL: We're quite aware of the standard of review. I'm asking you a factual question of why was the materiality of the testimony of the three proper rebuttal witnesses so minimal as to justify their complete exclusion.

MR. AVERBACH: Initially, Your Honor, I would like to correct what I believe is a misstatement of Mr. Edelman. The only witness who was actually identified on the record by Mr. Edelman at the time [12] that the hearing closed and Mr. Edelman indicated he wanted to put on rebuttal testimony was his own client. By that point his client had already testified for a substantial period of time and the court had already determined or made an assessment concerning her credibility—

JUDGE NEWMAN: On the record, but we're told the discussion took place off the record. Are you saying that if it wasn't on the record, it doesn't Count?

MR. AVERBACH: Your Honor, we don't know what happened off the record, but we do know what happened on the record, which is that when asked—

JUDGE NEWMAN: You don't know? You're here defending the government.

MR. AVERBACH: I'm sorry, Your Honor.

JUDGE NEWMAN: You're here representing the United States. You don't know what happened?

MR. AVERBACH: Your Honor, I do know what happened, but I can represent what is on the record and what is clear is that when asked, "Who do you want to put on for rebuttal," the only person Mr. Edelman identified was his own client.

CHIEF JUDGE MICHEL: Was there a proffer of what she would say in rebuttal that would meet [13] something that the

government's witnesses had said that he had already not previously spoken to herself?

MR. AVERBACH: I'm unaware of any such proffer. And Mr. Edelman's brief is devoid of any allegation or any specific fact that would have been alluded to on rebuttal that could conceivably have altered the administrative judge's decision—

CHIEF JUDGE MICHEL: What about the exclusion of the other witness, whatever their number was. A dozen or so, according to the count of Mr. Edelman.

MR. AVERBACH: The administrative judge had originally required the parties on December 2, 2002, to have a conference and inform the judge as to what the relevance of each witness's testimony was to be. On December 2nd, Mr. Edelman indicated that he had not spoken to a majority of those witnesses. The judge therefore granted additional time for him to contact certain witnesses and—

CHIEF JUDGE MICHEL: Well, what I want to know is what would they have testified to and what was the basis of excluding so many witnesses sought to be called by Dr. Hancock.

MR. AVERBACH: Many of the witnesses listed on the witness list were to provide—or at least [14] according to representation made, were to provide testimony concerning such things as what relationships in and out of work and other romantic relationships some other employees other than Dr. Hancock may have had with either—

CHIEF JUDGE MICHEL: Were those witnesses excluded on the basis that this litigation was not about romance or elicit affairs but was about professionalism on the job?

MR. AVERBACH: Your Honor, that's my understanding. I don't have anything specific to point to, but I am certainly informed—I can tell you what I know that's not on the record. But there is nothing in the record—

CHIEF JUDGE MICHEL: I don't think we can permit you to testify here as if this were a trial court and you were a fact witness. You certainly are limited to the record or something off the record that's subject to judicial notice.

MR. AVERBACH: What I can indicate is that the witnesses who were excluded were to provide largely information concerning other people's romantic relationships, other people's job performance, in an attempt to somehow compare Dr. Hancock's performance—

[15] JUDGE NEWMAN: That was fundamental to her establishing jurisdiction to appeal in the first place. Unless she can establish discrimination, which includes disparate treatment based on marital status, she had nothing to appeal. Whether her performance was good or bad, anything else. So that unless in fact it was conceded that she had the right to appeal the merits of her removal because she had established prime facie and didn't need further witnesses, that this was marital status discrimination. Is that the government's position?

MR. AVERBACH: Your Honor, I have to confess, I didn't understand the question.

JUDGE NEWMAN: [Inaudible] probationary period.

MR. AVERBACH: Correct.

JUDGE NEWMAN: She has no right to appeal other than on two grounds. This is one of them. This is what she's arguing. I was discriminated against because I was a married woman having an affair.

MR. AVERBACH: Correct.

JUDGE NEWMAN: So she seeks to provide testimony to support that position.

MR. AVERBACH: That's correct, Your Honor. But it also needs to—it's also incumbent upon the trial judge, or the administrative judge in this [16] instance, to be able to pro-

vide a basis and to ensure a basis for apples-to-apples comparisons and not go off on frog and detour about how other employees were treated in entirely different circumstances, such as, for example, whether or not a person was disciplined for having—an unmarried woman was disciplined for—

JUDGE NEWMAN: How do you show discrimination in Title VII cases? By comparative treatment. How were others treated. What's the culture, the community.

MR. AVERBACH: Certainly, Your Honor, there is limited room—there is room up to a point for comparing what happened in one case to what happened in another. But in order to prevent every single other person's employment history from becoming a side show and getting away from the fundamental issue, which is whether or not the reason offered for Dr. Hancock's termination was a pretext, there needs to be some kind of discretionary line drawn so as to ensure a meaningful basis for comparison.

CHIEF JUDGE MICHEL: What testimony was admitted about the treatment of other women at that park, both married and unmarried, so one could draw some inferences?

[17] MR. AVERBACH: One employee about whom Mr. Edelman suggests his client was not able to provide information did in fact have an opportunity to testify. That was Jennifer Surning (sic). And she was in fact permitted to testify on behalf of Dr. Hancock.

CHIEF JUDGE MICHEL: About the treatment by the same managers of her?

MR. AVERBACH: Concerning relationships that concerning the treatment, yes, concerning the treatment that she received—

CHIEF JUDGE MICHEL: Now, was she a married woman or a single woman.

MR. AVERBACH: She is a single woman,

CHIEF JUDGE MICHEL: Okay. And now, were there some married women whose experiences with allegedly harsh treatment to compare with the single women? I mean, you have to show that there is some different treatment, so you have to look at one or more examples on the married side and on the single side or you don't have anything to compare.

MR. AVERBACH: Your Honor, I don't know the marital status of each of the witnesses who in fact testified, but–

JUDGE MAYER: Well, were they having an affair, [18] whether they were married or not, with someone that they were supposed to investigate the background of and make a recommendation to hire them to the agency?

MR. AVERBACH: I'm sorry, Your Honor.

JUDGE MAYER: In this situation—do you not understand my question?

MR. AVERBACH: Yes, I didn't understand.

JUDGE MAYER: In this situation, the woman was supposed to look into his background, the guy she was having the affair with, and she was recommending him for appointment, and he had a deficient background, right?

MR. AVERBACH: That's correct, Your Honor.

JUDGE MAYER: So whether they were married or not, did any of these other women have a situation like that, where there is a performance going directly—

MR. AVERBACH: Your Honor, there is nothing in the record to suggest—I'm sorry, sir. There is nothing in the record to suggest a meaningful basis for a comparison to the unique circumstances of this particular case.

JUDGE MAYER: Then it wouldn't be relevant, would it?

[19] MR. AVERBACH: It would not, Your Honor.

CHIEF JUDGE MICHEL: Would Surang (sic) even have been relevant? If the issue is was the person, whether single or married, similarly situated, it doesn't seem that any prospective witness was similarly situated, at least with respect to the circumstance Judge Mayer described. In which case, no witness should have been called.

MR. AVERBACH: Your Honor, the notion of whether or not someone is similarly situated cannot be necessarily confined to the issue of whether or not another witness encountered precisely the same facts on all [inaudible] as what Dr. Hancock experienced because as the court perceives, there would never be any opportunity to compare what happened from case to case.

But there does have to be a line drawn somewhere and—enabling the trial court to limit the number of witnesses, to conduct a hearing within three days necessarily requires that—

CHIEF JUDGE MICHEL: Mr. Edelman basically is suggesting the hearing should have had a fourth day that should have included his rebuttal witness or witnesses—you disagree about the number—but that's the essence of what he's saying is that he (sic) [20] terminated the trial too fast.

I'm trying to understand what would make it look premature or what would make it look not premature.

MR. AVERBACH: I think, Your Honor, the best barometer as to whether or not it was premature or not premature is the issue of whether or not Mr. Edelman can identify a single fact that would have suggested from any witness whose testimony was excluded that would have in any way undermined the ALJ's conclusion.

Nowhere in his brief, nowhere in the record is there any evidence that Mr. Edelman has ever raised that suggests that the case would have somehow been different or whether the ALJ's conclusion would somehow—or even—

CHIEF JUDGE MICHEL: So you're saying no prejudice, even if some witness was excluded perhaps improperly, there was no harm to the case of Dr. Hancock.

MR. AVERBACH: We're certainly arguing that there was no harm. But to buttress our argument that there was no abuse of discretion in the first instance, we are indicating that there is nothing wrong with what happened, as evidenced by the fact [21] that there are no facts—

CHIEF JUDGE MICHEL: Do you agree that the scope of this hearing should have been measured by the terms of Title VII of the CASE rights statute.

MR. AVERBACH: Your Honor, the question of—I'm not sure I fully understand the question. In terms of the standards—

CHIEF JUDGE MICHEL: Well, Judge Newman alluded expressly to Title VII and it does provide an interesting analogue. And I believe it was the import of her question that in a Title VII case, the scope of relevance is quite broad, that there is lots of data admitted about how various people are treated so that you can build up a pattern of data to see if there is a pattern of discrimination, whether it's based on race or gender or whatever the particular factor might be.

And earlier you seemed to suggest that a narrower band of relevance should be drawn, and so that raises in my mind the question of is the right metric the Title VII metric or is the right metric something much narrower; and if so, what, and based on what authority.

MR. AVERBACH: Your Honor. I think Title VII represents an analogue that is appropriate, [22] particularly in I think this is evidenced in the manner in which the ALJ weighed the evidence and employed a burdenship to mechanism to determine whether or not a prime facie case had been established. And if so, whether or not the—

CHIEF JUDGE MICHEL: There is no complaint that the burden was shifted from her to the government. The complaint is that in ruling that the government successfully carried that burden, there were undue restrictions on the scope of witnesses on behalf of Dr. Hancock.

Now, you say, and it's quite right, the presiding judge has to draw the line somewhere. Well, of course, we all agree with that. The question is where and on what basis. Judge Newman suggested, I thought, that really it should be drawn just where you would draw it in a Title VII case because discrimination is at the heart of it. I just want to know whether you agree with that or you don't agree with that.

MR. AVERBACH: I do, Your Honor, although I think—and I have an "although."

CHIEF JUDGE MICHEL: You do but you don't.

MR, AVERBACH: Title VII is somewhat different in that the question of whether or not someone was [23] terminated or retaliated against because of their gender is not necessarily the same issue as whether or not they were terminated because of their marital status.

JUDGE MAYER: That's right. Let me clarify what I was trying to get at. The people who removed her testified—and I think it was also in writing I think it was unequivocal. She was removed because they didn't care for her morals, her morality. They said it was disruptive, they said it was improper, and they didn't like it.

She sought to introduce evidence that here in Hawaii, this is how people behave, that things are looser, supervisors were having affairs with unmarried women. And in order to try and get this case of removal after only three months on the job into the statute for [inaudible] B appeals, there are only two bases on which you can appeal. One of them is marital status discrimination.

So she says, well, there are all these affairs between unmarried people, I happen to be married, although separated or whatever the facts may have been, and therefore I'm discriminated against because I'm disapproved of and these other people who were doing exactly the same thing but without [23] this added encumbrance of a spouse some place, it's accepted.

So that was what, as I understood it, she was trying to continue to establish and to establish on rebuttal. And to me the question—the fundamental question, which I didn't really see anyone arguing, is in fact removal on moral grounds, which perhaps within the probationary period can be done whenever someone's morality is different from removal based on marital status discrimination. And if so, then I would assume there would be no basis on which she could appeal and it should have been dismissed even though I appreciate that the AJ will often listen to the merits in order to build a complete record.

CHIEF JUDGE MICHEL: If you have an answer, better make it quick because your time has expired.

MR. AVERBACH: Let me very briefly attempt to. Your Honor, I believe that the question of morality, to the extent it's been raised here, is identical to the question of marital status discrimination. The only quote unquote moral reason offered was—or the only moral reason is the existence or nonexistence of an extramarital affair. And I'm not sure it's possible to separate the two in this case.

Of course, as described in our brief, we don't [25] believe that that was actually the reason for the termination as it's documented in here in both the opinion and in [inaudible].

CHIEF JUDGE MICHEL: Mr. Averbach, thank you very much for your argument. And one little suggestion is that you need to keep your voice constantly up and a little bit more projection and volume for us to hear you well. We heard you, but just barely. Thank you very much.

Mr. Edelman, rebuttal for you. You have two minutes, sir.

MR. EDELMAN: Thank you, Your Honor. With the brief remaining time, Your Honor, I would like to deal with two of the issues that were brought up during Mr. Arburback's time and that is, number one, I want to assure Your Honors that virtually all of the witnesses who were excluded were prepared to testify to matters of professional responsibility and to activities that were perpetrated by the supervisors that were related to marital status discrimination or had to do with comparison of Dr. Hancock's position with others.

And in particular, the only real—only two women who were comparable as single women were Jennifer Surang, who was the superintendent's [26] not-so-secret girlfriend who got one promotion—

CHIEF JUDGE MICHEL: But she testified, so there was no exclusion there.

MR. EDELMAN: No, she testified, but I'm saying in terms of the issue of comparison—I've kind of switched gears quickly because I didn't have much time. And Maria Carnivale, who was initially a volunteer and who was the pet project of Mr. Hughes, who was Dr. Hancock's supervisor, both of them were treated extraordinarily well, given all kinds of benefits and promotions. And I think that if those are and those should be the two people who comparisons should be made to Dr. Hancock, I think that the conclusion is obvious that there was discrimination.

CHIEF JUDGE MICHEL: Did the latter lady testify, Carnivale?

MR. EDELMAN: Yes, she did.

CHIEF JUDGE MICHEL: So she was also allowed.

MR. EDELMAN: Yes.

CHIEF JUDGE MICHEL: All right.

MR. EDELMAN: Thank you, Your Honor.

CHIEF JUDGE MICHEL: Thank you, sir. We thank both counsel. We'll take the case under advisement.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed August 9 2005]

04-3401

KATHY M. HANCOCK,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION BOARD IN SE315H020399-I-1

CORRECTED OPENING BRIEF OF PETITIONER KATHY M. HANCOCK.

JOEL EDELMAN, ESQ.
1135 Makawao Ave., #204
Makawao, Maui, Hawaii 96768
(808) 573-0838

August 16, 2005 *Attorney for Petitioner*

* * * *

ARGUMENT

I. HANCOCK WAS DENIED SEVERAL BASIC PROCEDURAL RIGHTS BY THE AJ

A. Hancock suffered multiple violations of her rights. In particular, The AJ denied Hancock the right to call the *ma-*

jority of witnesses listed by Hancock. A total of fifteen prospective witnesses listed on Hancock's Pre-Hearing Submission dated November 29, 2002 (Vol. 1, Tab 15) were denied the right to appear as witnesses. Exhibit App. 1 is a list of prospective witnesses who were not approved by the AJ. Three additional prospective witnesses were approved as possible "rebuttal" witnesses [but no rebuttal was ever allowed].

The 6th Circuit Court addressed this issue in *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir. 03/19/1992), where it stated"

> . . . [D]ue process requires that a discharged employee's post-termination hearing be substantially more "meaningful". At a minimum, this requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him. The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity for such a full hearing, so that he may challenge the factual basis for the state's action and may provide reasons why that action should not be taken." *Carter v. Western Reserve Psychiatric Habilitation*, 767 F.2d 270, 273 (6th Cir. 1985) (citations omitted).

In *Consolidated Edison Co. Et Al. V. National Labor Relations Board Et Al.* *FN*, 59 S. Ct. 206, 305 U.S. 197 (U.S. 12/05/1938), the United States Supreme Court agreed with the Circuit Court, which held that in refusing to hear witnesses constituted a denial of due process of law by stating

> "A more serious question grows out of the refusal to receive the testimony of certain witnesses." *Id.*, at 305. In this matter the Court held "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary." *Id.*

By way of example only, Hancock will highlight two such prospective witnesses who Hancock made several unsuccessful attempts to have approved as witnesses:[1]

1. *Lucy Whiting.* Ms. Whiting was the Personnel/ Administrative Officer at the Agency's Kalaupapa facility. As such, she had relevant, then—current and historical knowledge about the circumstances of Hancock's termination (including correspondence and conversations among Superintendent Workman, Hancock, Supervisor Hughes, Lea Scow (the NPS Personnel Officer for the Pacific Islands Support Office in Honolulu who was advising Hughes prior to and following Hancock's termination).

   Ms. Whiting would have diametrically opposed Workman's and Hughes' testimony as to many of the circumstances, facts and conversations leading up to Hancock's termination. Ms. Whiting would have testified to past, current and post-termination instances in which married women were treated differently from single women. Ms. Whiting would have testified to then—recent activities by Superintendent Workman against a married woman—that he followed a process that was strikingly similar to the one in which Hancock was terminated.

   Ms. Whiting's testimony would have caused the AJ to view the testimony of *all* of the Agency's witnesses in a very different light—likely leading to an upholding of the appeal.

2. *Albert Pu.* Himself an experienced and long term supervisor who worked directly for Workman, Pu could have testified to:

   * The preferential treatment that *has been* (and is still being given) by Supervisor Hughes and Superintendent Workman to *single women.* These prefer-

ences include housing, payment of utilities, pay grades, and handling the consequences of unauthorized use and abuse of government property,

** The past and current efforts made by Superintendent Workman in going out of his way to enlist subordinate supervisors to "build discipline cases" against NPS employees that Workman does not like (and to have it appear that Workman had little or nothing to do with the termination/discipline).

*** The quality and the quantity of the work performed by Hancock. Mr. Pu had numerous occasions to be familiar with the work being done by Hancock and familiar with the way she conducted herself with supervisors and other NPS employees in this very small work and residential community.

**** The social/political/supervisory "climate" that was perpetrated and imposed by Workman—a climate that did not tolerate individuals whose morals, viewpoints, and lifestyles were different from his.

Pu's testimony would have supported the jurisdictional basis for a hearing—that, in fact, *single* women and *married* women *were treated differently.*

B. This hearing was held in Honolulu from December 10-12, 2002, in front of an AJ, Agency counsel, and court reporter—who all of had flown to Honolulu from the San Francisco Bay area. From the start, it was clear that they were anxious to return to the mainland to be with their respective families during the upcoming Christmas season. The direct testimony of the Agency's witness on the last day took several times longer than was estimated by the Agency. Even though the AJ extended the ending time of the hearing until well into the evening, Hancock was denied several vital rights:

1. At the December 2, 2002 Pre-Hearing Conference (conducted by telephone conference call), the AJ stated that the hearing could begin sometime on December 10, 2002 and could go until December 13, 2002—

* * * *

her questions to the Agency's witnesses sounded more like questions intended to elicit Agency-friendly responses.

The effect of such questioning by the AJ on the parties, the witnesses and the attorneys was an all-too-obvious prelude to where the AJ was headed.

6. Following the close of testimony, the AJ "closed the record" and did not even allow any written closing argument (Vol. 6, Page 307).

C. From the very beginning of the appeal process, the AJ moved the process along too rapidly. For example, even before: (i) the voluminous discovery was partially complete and (ii) it was fully known how many witnesses there would be and how many documents there would be, specific hearing dates and times were imposed. The process was too rushed. Too little time was allowed to digest and analyze the mass of evidence. The amount of time set aside for the hearing was too brief and such hurrying along undoubtedly was a cause of so many of Hancock's proposed witnesses being excluded. See *Schucker v. Federal Deposit Insurance Corporation*, (Presiding officials "should scrupulously avoid rulings which deny employees the fair and impartial trial guaranteed to them").

* * * *

She had been recommended by *Hughes' mother*; and Cerny was *his Supervisor's girlfriend!*

At first, Carnevale was the volunteer (later hired as an employee) who Hughes had taken under his wing as his "pet personal project"—she was given free rent, utilities and no discipline for her destroying government property when she wrecked a car that she had no authority to drive. If Carnevale (and/or Cerny) were to be considered the persons needed for "comparison" to Hancock, there should be a *directed finding, of marital, status discrimination.*

C. Although it has been also stated above, it is also worth noting under this section that the AJ *systematically excluded* many witnesses named by Hancock who could have credibly testified to what was truly going on at the Park. Proposed witness Albert Pu and Lucy Whiting, for example; Witnesses who had:

1. Directly experienced and/or observed the discriminatory behavior of Workman (and, later Hughes);
2. Intimate personal and professional knowledge of the conditions under which the Park was operated by Workman;

* * * *

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Oct. 11, 2005]

04-3401

KATHY M. HANCOCK,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION BOARD IN SE315H020399-I-1

REPLY BRIEF OF
PETITIONER KATHY M. HANCOCK

JOEL EDELMAN, ESQ.
1135 Makawao Ave., #204
Makawao, Maui, Hawaii 96768
(808) 573-0838

October 5, 2005 *Attorney for Petitioner*

* * * *

Page 6 [lines 14-15]: Re: "[Hancock] communicated and operated outside the supervisory framework upon several occasions."

All of Hancock's memoranda and emails to NPS personnel outside the Park were legitimate and appropriate responses to inquiries from other *NPS employees*. Workman and Hughes

attempted to keep much of their embarrassing and crazy-making conduct from being known to others in the NPS (who had a right and duty to know). In effect, Hancock is also being punished for a form of her "whistle blowing" to individuals—all of who had "need to know" about *safety issues*.

Page 7 [lines 8-9]: Re: "he had not personally spoken with a majority of the witnesses from whom he proposed to elicit testimony."

At the December 2, 2002 telephone conference call, Hancock's counsel had not spoken to *all* of the witnesses (because some were out of town or otherwise unavailable by phone). By December 2, 2002, of the 32 proposed witnesses for Petitioner, counsel had spoken to all but approximately six of the potential witnesses; and had left messages for these six.

Page 8 [lines 1-2]: Re: "contentious exchanges"

Again, the only such "contentiousness" was in Hughes' writing. According to Hancock, the face-to-face exchanges were, by and large, friendly and positive.

Page 8 [line 6]: Re: "failed to prove was pretextual"

The Administrative. Judge (hereinafter "AJ) did *not allow any rebuttal* to the Agency evidence. Hancock did not know what the Agency's witnesses were going to say *until they testified*. After the Agency witnesses testified, Hancock was not given a chance to present evidence to rebut the Agency's "no pretext" evidence.

Page 8 [lines 11-12]: Re: "Ms. Hancock provided no explanation as to why this information was not submitted before the record closed."

At the time of the hearing, Hancock was simply unaware of Christi Shaw (the married woman who had also been discriminated against based on marital status). After the hearing, it was brought to Hancock's attention. Ms Shaw had

left the Park two months prior to Hancock's arrival. Because Ms. Shaw had left before Hancock's arrival, Hancock was unaware of Shaw's existence until after the hearing.

Page 9 [lines 5-6]: Re: "known to be relevant"

This Agency statement is clearly self-fulfilling. There were a large number of witnesses who had clearly relevant, non-cummulative information to provide at the hearing. Further, the Agency's statement attempts to "put words" in the AJ's mouth; statements that were neither spoken nor written by the AJ There is no citation for this Agency statement because the AJ never made this statement.

Page 9 [line 7]: Re: "after-acquired evidence that was available to Ms. Hancock at the time of the hearing."

The evidence was *not* available at the time of the hearing. The Board *did* err.

Page 9 [line 8]: Re: "of minimal if any relevance to her case"

It was *not* minimal and it was of *great* relevance to the case.

Page 11 [line 12]: Re: "sound" discretion

It was *un*sound and it was an abuse of the AJ's discretion.

Page 11 [line 13]—Page 12 [lines 1-6]: Re: "In this case, Ms. Hancock included no fewer than 32 witnesses on her witness list but, prior to the hearing, her attorney informed the administrative judge that he had not personally spoken with a majority of them."

There is no citation provided with this alleged statement because the statement is *un*true. As stated above, there were approximately six witnesses with whom counsel had not yet spoken; and messages had been left for those six.

Re: "The administrative judge permitted the witnesses with whom Ms. Hancock's attorney had spoken to testify."

The Agency's statement is *absolutely false*. The Agency intends to mislead the Court. Herein, the Agency's desperation is on full display. Such desperation has caused the Agency to state, as an unequivocal fact, something that is so outrageously *un*true. Petitioner and her counsel are astounded and dumbfounded by this blatant lie. In reality, the AJ did not approve the overwhelming majority of the witnesses to whom Hancock's counsel *had spoken to*.

The Agency has no factual basis for making this statement. If for no other reason than the Agency believes that it needs to tell such a blatant lie to keep the matter from being overturned, this matter *should be overturned*.

Hancock protests this Agency statement in the most vigorous terms.

Page 12 [lines 5-6]: Re: ". . . upon behalf of Ms. Hancock, and afforded her attorney more time to contact additional witnesses."

The AJ *did* allow Hancock's attorney additional time to contact rebuttal witnesses. However, the *proposed witnesses who the AJ stated were* "not approved", continued to remain "not approved." Otherwise, there is no documentation and no citation for this Agency statement. Again, the Agency is attempting to put words and statements in the record that were never made.

Page 11 [footnote 3]: The Agency's footnote is, *at best*, grammatically confusing, a violation of proper grammatical structure and nearly unintelligible. To the extent that at least the footnote's conclusion can be understood, the Agency's conclusion is incorrect. The underlying basis for the court's *en banc* consideration of *Garcia* (and its direction to the parties for further briefing) should also have an affect on the resolution of the matter herein. That is, the decision in *Garcia* will likely affect the *Hancock* matter.

Page 12 [lines 8-12]: Re: "Moreover, her descriptions of the testimony that allegedly would have been supplied by Lucy Whiting and/or Albert Pu (the exemplars of excluded witnesses she offers) do not include, except in the most conclusory terms, *examples of specific facts* that could conceivable have affected the administrative judge's resolution of Ms. Hancock's case."

The description of the proposed testimony of two of the excluded witnesses (Lucy Whiting and Albert Pu) demonstrate that their testimony would have been clearly relevant, factual and *non*-conclusionary.

Page 12 [lines 12-14]: Re: ". . . given that Ms. Hancock's attorney was unable to represent, even upon the eve of the hearing, that he had *knowledge as to the precise content* of these witnesses' testimony. ."

Herein, the Agency continues its outrageous campaign of urging this Court to accept as "fact," alleged statements that were never spoken or written by the AJ or cited by the Agency.

Page 12 [lines 14-16]: Re: ". . . the administrative judge's decision to limit Ms Hancock to those witnesses with testimony *known to be relevant* was not an abuse of discretion."

That is one of the very issues that Hancock is raising. The AJ clearly *excluded* a number of witnesses who had contemporaneous, personal, relevant evidence that bear directly on the issues at hand.

Page 13 [lines 3-4]: Re: ". . . her argument is devoid of any fact that she was not entitled to present on rebuttal."

The AJ had *pre-approved, several rebuttal witnesses.* These witnesses would have testified to (among other relevant facts):

(1) The marital status discrimination that was actively practiced by Workman;

(2) Evidence of an Agency pretextual campaign to terminate Hancock;

(3) How significant statements and memos made by Cerny and Carnevale (that were highly critical of Hancock) were demonstratively untrue.

(4) Hancock was a high quality, faithful employee who had successful and appropriate professional relationships with many other Agency employees at the Park and through out NPS.

(5) The only Park workers who where critical of Hancock were the four "Haolie Hui" members who had testified against Hancock.

(6) The entire administrative structure of the Park was insanely dysfunctional and was under Workman's tight control. No significant personnel actions occurred without Workman's pre-approval.

Furthermore, there were some witnesses whose testimony *became* relevant because of what the Agency witnesses had said. Much of what the Agency witnesses would say was *not* known in advance by Hancock.

Based on the pre-hearing communications among the AJ, Agency counsel and Petitioner's counsel, there was a reasonable expectation (and assumption) that rebuttal witnesses for Petitioner would be allowed. At the last moment, and to Hancock's surprise, the AJ denied Hancock any opportunity to rebut the Agency's witnesses.

Perhaps the desire to return home by flying on a workday (rather than on a Saturday or Sunday) may have played a part in that denial (in addition to wanting to maximize time at home in advance of the end-of-the-year holidays).

Whatever the "justification" may have been, the AJ, Agency counsel and the reporter (all of whom were visiting from the San Francisco Bay area) "won" by being able to

return home on Friday, December 13, 2002. But Hancock "lost" by having the hearing foreshortened and by her being prevented from presenting rebuttal evidence (and a real closing argument).

Page 13 [line 5]: Re: ". . . Ms. Hancock was afforded *at least two days* to put on her case . ."

Much of that "two days" was cross-examination by Agency (as well as cross-examination by the AJ. To adequately present her case, Hancock needed three or four days. That would have included relevant witnesses who were "not approved" by the AJ.

Page 13 [lines 8-14]: Re: ". . . (no error in excluding testimony where Petitioner failed to show that testimony would have added to the record) . . ."

Re: "(Petitioner not entitled to *present* repetitious or *immaterial evidence* and must show how *excluded testimony* would buttress case) . . ."

Re: ". . . (conclusory assertion that testimony was necessary to rebut agency's statements does not establish that board abused discretion in excluding testimony)."

As more fully set forth above (concerning page 16, lines 3-18), Petitioner has stated facts as to how the excluded testimony has satisfied the test of *Davis v. Office of Personnel Management*, 918 F.2d 944 (Fed. Cir.1985).

Page 13 [lines 17]—Page 14 [line 1]: Re: ". . . whether the "pacing, flow, contexting and rhythm of [Ms.] Hancock's counsel were thrown off course," Petitioner's Br. At 19, such questioning falls well within conventional the role of a trial judge, particularly where, as here, the judge is the finder of fact."

In 35 years of practicing law, mediation and being a pro-bono judge, Hancock's counsel had never before participated in a trial or administrative hearing (when the parties had

counsel) wherein the judge had asked so many questions and wherein the judge's examination of one party's witnesses was so clearly cross-examination.

During the hearing, the AJ did not make much of a pretense of evenhandedness in the manner, length, quality, quantity and timing of her "witness interruptus" behavior—especially toward Hancock's witnesses.

This witness questioning behavior was preceeded by the AJ's wholesale witness-*exclusion* of ANY rebuttal witnesses. The "icing" on this tasteless "cake" was the AJ providing "no more than five minutes" for the immediate 8:00 pm closing argument (that was reluctantly allowed by the AJ).

As advanced by the Agency, "such questioning falls well within conventional (sic) role of a trial judge, particularly where, as here, the judge is the finder of fact."

In Hancock's view, the AJ's aggressive and one-sided questioning herein should be viewed as a judicial aberration; the kind of aberration that should not be encouraged.

Page 14 [line 3]: Re: "length of closing argument"

Forcing Petitioner to "plead" for final argument, and then for the AJ to allow only five minutes of argument, delivers several implicit messages from the AJ to the parties—none of these messages were either necessary or appropriate. These messages include:

(1) I really don't need (or want) any closing argument; I have heard enough and I have already made up my mind.

(2) Because you seem so insistent on it, I'll give you a token amount of time to summarize your case.,

(3) It's 8:00 pm, at the end of three days and I don't think I can take in any more information.

(4) I didn't want rebuttal either; that would take real time and would cause our team's departure from Hawaii to be delayed. A total of ten minutes for closing won't upset our travel plans.

Page 14 [line 3]: Re: "decision not to permit closing briefs"

The combination of "no rebuttal" and "no closing briefs" effectually cut off Hancock's right to: (1) demonstrate that Agency witnesses were lying, (2) demonstrate that Agency witnesses were otherwise misleading the judge, and (3) summarize the evidence in Hancock's favor.

There were three days of testimony and ten witnesses. For the AJ to deny Petitioner the right to provide written closing argument (on top of denial of rebuttal and only allowing a telegraphic-like closing argument) was yet another set of implicit messages from the AJ that were consistent with, the previously-stated messages.

Page 14 [line 16]: Re: "why this evidence was unavailable to her previously?"

It is not so much a matter of "why;" it is more a matter *that, in. fact*, Hancock *was unaware of it previously*. No one had brought it to her attention. Ms. Shaw had left the Park approximately two months prior to Hancock's arrival. During the brief hearing preparation time provided by the AJ, Hancock was focused on the facts of *her* own case.

Page 15 [line 3]: Re: "despite due diligence"

As it was, the AJ only "approved" a total of 10 of the 32 proposed witnesses (approximately 30%). The likelihood of the AJ approving any more was almost nil.

Page 15 [line 4]: Re: "complaints concerning abbreviated discovery"

During the telephone conference call of December 2, 2002, in response to Petitioner's counsel's concerns about the wit-

nesses and the timing, the AJ made it perfectly clear that there would be *no continuances*. Plans had been made, reservations had been made. The hearing (which was originally scheduled for *four* days) was going forward. Period.

Page 15 [line 12]: Re: "tangential relationship"

These are *directly* related to the issues raised by Hancock—the extent to which there was *marital status* (and other forms of discrimination) and whether the Agency's stated reasons were pretextual.

The Agency not only went to any length to *terminate her*, the Agency went to any length to *punish Hancock* (and her boyfriend Haskins) by making sure that she would be *un*able to live at the Park. This evidence goes to the heart of the issue of the Agency's *intent*. That is, the Agency was not satisfied with simply *terminating* Hancock, they wanted her *banished* and *punished*.

Page 15 [lines 14-15]: Re: The AJ "had a full opportunity to asses the credibility of the witnesses".

The AJ denied Petitioner any rebuttal. The AJ denied Petitioner the opportunity to present 70% of her witnesses. Having the "*opportunity*" to assess the credibility of the witnesses is separate and apart from *how objectively* and thoroughly the AJ used her "opportunity to assess" and her opportunity to even *allow* Petitioner to present her case.

Page 15 [footnote 4, line 19]: Re: "allegedly favorable treatment"

Cerny's upgrade was *after the hearing* (perhaps as a further "reward" for the testimony that Hughes and Workman clearly wanted her to give).

Page 16 [line 1]: Re: "under entirely different circumstances"

Given that there were only two other possible females (Carnevale and Cerny) that Hancock's treatment could pos-

sibly be compared to *and given* that these two other single women were the respective "favorites" (on several levels) of the two relevant male supervisors (Hughes and Workman), *and* given that

* * * *

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

[Filed November 29, 2002]

DOCKET NUMBER. SE-315H-02-0399-I-1

KATHY HANCOCK,

Appellant,

vs.

DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE PACIFIC WEST REGION,

Agency.

I. INTRODUCTION

This Board ordered the parties to present a pre-hearing submission statement. Comes now the Appellant, through counsel Joel Edelman, and submits the following statement of facts and issues, list of witnesses and list of exhibits.

II. BACKGROUND

On August 30, 2002, Appellant, a non-preference, competitive service employee was removed during her probationary period from her position as a GS-9 Marine Ecologist at Kalaupapa National Historical Park; National Park Service, Department of the Interior. Appellant has appealed her removal alleging: (1) marital status and other related forms of discrimination and (2) that the relevant facts set forth in the Agency letter of termination are substantially untrue and are manufactured reasons to mask the true discrimination.

III. STATEMENT OF FACTS AND ISSUES

A. Facts

Kathy Hancock was a probationary employee. During the course of her employment with the National Park Service (NPS) of the United States Department of Interior (the Agency), Appellant was supervised by Guy Hughes (himself a probationary supervisor).

As more fully set forth below, Guy Hughes and his supervisor, Tom Workman practiced various forms of discrimination on Ms. Hancock.

1. Guy Hughes misused his authority against Hancock. He wrongfully discriminated against Hancock based on matters that were *outside the scope of his supervisory authority.*

2. Hancock was discriminated against based on marital status:

   Because Hancock was married and was openly having a sexual relationship with a man other than her husband, Hancock was discriminated against based on her "marital status". Mr. Hughes made it clear that the source of his (and his supervisor's) problem with Hancock's sexual relationship with Mark Haskins (an NPS employee), was that Hancock *was married.* That is *Hancock's supervisors would not have had a problem if she had not been married.*

3. Hancock was also discriminated against by Hughes based on a combination of Hancock's sex and Hughes' and Workman's religious beliefs:

   Because Hancock was having a sexual relationship with a male NPS employee who was *other* than her husband, Hancock was discriminated against based on her *supervisor's religious beliefs* (and the religious beliefs of *his* supervisor)—both of whom openly con-

demned and punished Hancock for her *personal* relationship with another NPS employee.

4. Hancock was discriminated against for exercising her *First Amendment Rights*:

   Hancock's supervisor and his supervisor violated Hancock's First Amendment right of *freedom of association* by punishing, making an example out of her and being critical of her (and her boyfriend) because, as a married and divorc*ing* woman, Hancock was not hiding the fact that she was living with a man and having a loving, sexual relationship. That is, they discriminated against Hancock because of *who she chose to relate to* and *how she chose to relate to him*.

5. Hancock was discriminated against based on "*non*-job-related conduct."

   Hancock's personal relationship was *separate* from her job as a marine biologist. Hughes discriminated against her by making a *work issue* out of the fact that she was having a *personal off*-the-job relationship with Mark Haskins.

6. Hancock was discriminated against based on Section 717 of the Civil Rights Act of 1964 (426USC 2000E-16) "Marital Status."

   Hancock's supervisor, with the open (and tacit) approval of his supervisor, began to manufacture on-the-job problems that Hancock was supposedly having. Hughes did this to "cover up" for his (and his supervisor's) discrimination based on what they believed was her offensive *outside-of-work personal* relationship.

7. While Supervisor Tom Workman was critical of Appellant for openly having a personal/sexual relationship with Mark Haskins, Workman was surreptitiously having such a personal/sexual relationship with Jennifer Cerny. Work-

man was also resentful of the openness of Hancock and Haskins.

8. Cerny first functioned as a volunteer and later was hired as a full time Cultural Anthropologist by Workman.

9. Although the position announcement for the Cultural Anthropologist had been "closed" prior to Cerny applying for the job, under pressure from Workman, the list had been "reopened" to allow Cerny to apply.

10. Later, Cerny's mother was brought on as a volunteer at the NPS by Cerny and Workman.

11. Guy Hughes and his family had been a friend of Maria Carnevale, who was first brought on by Guy Hughes as a volunteer.

12. Later, Hughes hired Carnevale as a full time employee as a Biological Technician after he actively discouraged the number one applicant from taking the job.

13. After Hancock's termination by Hughes, he went to the Hawaii Department of Health in an attempt to persuade them *not* to take on Hancock as a volunteer because it would make Hughes uncomfortable. Hughes knew that unless Hancock secured a volunteer position, Hancock would have to leave Kalaupapa.

14. The concept that the residents at Kalaupapa were disturbed by the Hancock/Haskins s relationship is untrue.

15. The concept that the residents committee would veto the agency dive program because they were upset with the Hancock/Haskins relationship is untrue.

16. Hancock was not terminated because of poor work performance or because of her inability to work effectively or to follow Hughes' directions.

17. Hancock had an outstanding work and academic record prior to working at the Agency.

18. Hancock's work performance at the Agency was excellent and gave no cause for termination.

19. The memo and e-mail "war" was initiated by and perpetrated by Hughes as an unnecessary and intentional provocation to invent "cause" to terminate Hancock; Hughes true motivations, and those of his supervisor Workman, were to punish Hancock for her open relationship with Haskins and to cover up their own respective improper conduct in taking on (and later hiring) friends/lovers and to cover up personnel actions in violation of Agency rules and regulations.

20. Hancock had generally good rapport with her coworkers, except perhaps those who had a working relationship poisoned by Hughes and/or Workman.

21. Hancock successfully recruited and mentored her volunteers,

22. Hughes and Workman caused Hancock and many other Agency employees to take a great deal of time dealing with memos and other bureaucratic/paperwork details that caused employees to spend less time doing their jobs.

23. Carnevale (the family friend of Hughes recruited and later hired by Hughes) had personal difficulties with and lied to other Agency personnel (in addition to Hancock).

B. Issues

(1) Whether Appellant was discriminated against as set forth above.

(2) Whether the true reason(s) for Appellants termination was based on the alleged discrimination.

(3) Whether the Agency's allegations set forth in their notice of termination are substantially accurate or are created by the Agency in an attempt to justify Hancock's termination.

(4) Whether Appellant's first line and second line supervisors (in carrying out their own jobs) acted in such a manner that Appellant became aware of her supervisors' improper activities such that these supervisors believed that they had to terminate her in order to protect their own jobs.

(5) Whether Appellant was terminated because she was having an affair with a fellow employee.

IV. AGREED UPON MATERIAL FACTS

The parties have not agreed upon any material facts. However, the following facts are 'undisputed:

1. Appellant was terminated during her probationary period.

V. WITNESS LIST

1) Dr. Dan McGuire
Physician, Kaunakakai

Testimony on the date of Mr. Haskins dive physical and his office billing error for said physical.

2) Lester Delos Reyes
Park Safety Officer, Kalaupapa National Historical Park

Testimony about his relationship with Maria Carnevale, his guiding her in treacherous coastal field work, and Mr. Hughes solicitation of information about Dr. Hancock's involvement in such field work. Testimony about Mr. Delos Reyes conversation with Mark Haskins and Dr. Hancock over the Water Safety Officer Position and Mr. Hughes subsequent solicitation of the memo concerning the conversation from Jr. Delos Reyes.

3) Tim Trainer
Chief Ranger and Former Park Safety Officer, Kalaupapa National. Historical Park

Testimony concerning Mr. Haskins requests to be appointed as Water Safety Officer beginning in 2001, prior

to Dr. Hancock's appointment as Ecologist for Kalaupapa National Historical Park.

4) Larry Basch
Coral Reef Science Advisor, Hawaii Volcanoes National Park

Testimony concerning e-mails between himself and Dr. Hancock about Park Service SCUBA diving and the dive program at Kalaupapa National Historical Park.

5) Crystal Egusa
Friendly Market, Kauanakakai

Testimony about her conversation with Dr. Hancock concerning summer employment for her son with the Natural Resource Division at Kalaupapa National Historical Park.

6) Mark Haskins

Testimony concerning Mr. Workman's question of Mr. Haskins over his relationship with Dr. Hancock. Testimony concerning his conversation with. Mr. Hughes on October 11, 2002, during which Mr. Hughes apologized to Mr. Haskins, admitted the billing error by Dr. McGuire, and suggested that Mr. Workman had a problem with Mr. Haskins relations with Dr. Hancock. Testimony concerning seeing Ms. Carnevale in Honolulu on August 12, 2002, after Ms. Carnevale told Dr. Hancock that she would not be in Honolulu until August 14, 2002 because she had to take the pre-hire drug screening test require by the Park Service at Molokai General Hospital on August 13, 2002.

7) Ka'ohulani McGuire
Contract Cultural Anthropologist, Honolulu

Testimony concerning Ms. Carnevale's interference in Cultural Resource issues, Ms. Carnevale's comments to Ms. McGuire and subsequent lie to Dr. Hancock about said comments.

8) Lucy Whiting
Administrative Officer, Kalaupapa National Historical Park

Testimony about the precedent set by Mr. Hughes paying for Ms. Carnevale's trip from Rhode Island to Kalaupapa with Park Service funds and not paying for Dr. Hancock's trip from the mainland to Kalaupapa with Park Service funds. Testimony about Mr. Hughes conversation with Ms. Whiting on October 11, 2002, concerning poor working relationships among Park Service employees. Testimony about the accusations and subsequent investigation of Ms. Whiting concerning an envelope which contained information concerning the termination of Dr. Hancock. Testimony concerning Ms. Carnevale's negative attitude and difficulty in getting along with Ms. Whiting and other Park Service employees.

9) Melissa Hughes
Spouse of Guy Hughes, Ho'olehua, Molokai

Testimony concerning Ms. Carnevale spending weekends in her (Ms. Hughes) home, babysitting of the Hughes' children, painting of the Hughes' home, and Ms. Carnevale's personal relationship with Ms. Hughes' mother-in-law.

10) Sejer Eberson
Former Volunteer, Kalaupapa National Historical Park

Testimony about incident between himself and Ms. Carnevale over the use of a Park Service vehicle and Ms. Carnevale's subsequent lie to Dr. Hancock about the incident.

11) Tasja Eversol
Former Volunteer, Kalaupapa National Historical Park

Testimony concerning Mr. Hughes request that Ms. Eversol not speak to Dr. Hancock during work hours because

it made Ms. Carnevale uncomfortable. Testimony about Ms. Carnevale interfering in Cultural Resource issues between Ms. Eversol, Ka'oulani McGuire, and Ms. Cerny.

12) Calvin Flores
Former Custodian, Kalaupapa National Historical Park

Testimony concerning Ns. Carnevale's negative attitude and difficulty in getting along with Mr. Flores.

13) Meli Watanuki
Clerk, Kalaupapa Store

Testimony about Ms. Carnevale publicly voicing her negative attitude in the store.

14) Randall Watanuki
Volunteer Diver, Kalaupapa. National Historical Park

Testimony concerning Mr. Hughes questioning Mr. Watanuki about Dr. Hancock's field methods after he had given her a termination letter and told her not to do any more field work. Testimony concerning Ms. Carnevale's lies to Mr. Watanuki.

15) Kaleo Elia
Kalaupapa National Historical Park

Testimony concerning Mr. Hughes lack of supervisory skills, poor organizational skill, poor project directions to supervisees and changing his directions after a supervisee has already begun the project.

16) Lea Scow
Personnel Officer, Pacific Island Support Office, National Park Service, Honolulu

Testimony concerning her counseling of Guy Hughes through the termination of Dr. Hancock including their conversation on august 16, 2002. Testimony about Dr. Hancock's request for personnel regulations and Ms. Scow giving her only that information concerning

termination of a probationary employee. Testimony about the hiring process for Cultural Anthropologist (filled by Ms. Cerny) and for Biological Technician (filled by Maria Carnevale).

17) Andrea Shluker
Applicant for Biological Technician position filled by Maria Carnevale.

Testimony concerning Mr. Hughes discouraging Ms. Shluker from accepting the position by describing the housing conditions in the worst possible light.

18) Michael McCarten
Administrator, Department of Health, Kalaupapa Settlement.

Testimony about Mr. Hughes trying to persuade him not to hire Dr. Hancock as a volunteer and any relevant conversations between Tom Workman and Mr. McCarten.

19) Gloria Marks
Head of Patient Advisory Council, Kalaupapa Settlement

Testimony about conversations with Mr. Workman and Mr. Hughes over their suggestions that the patients were upset over the relationship between Dr. Hancock and Mr. Haskins including the letter of apology sent to Ms. Marks by Tom Workman. Testimony that the Patient Advisory Council did not consider Dr. Hancock's personal relationships to be relevant to the patient view of the Park's dive program.

20) Albert Pu
Chief of Maintenance, Kalaupapa National Historical Park

Testimony concerning Dr. Hancock's working relationship with other Park Service employees. Testimony concerning Mr. Workman and Ms. Cerny traveling together on Mr. Workman's business trips and Mr. Workman

using his federally issued credit card to pay for Ms. Cerny's trip.

21) Ku'ulei Bell
Post Master, Kalaupapa Settlement

Testimony about the patient view of Dr. Hancock's relationship with Mr. Haskins, the non-effect of said relationship on the dive program, and patient views on the relationship between Mr. Workman and Ms. Cerny.

22) Ivy Kahilihiwa
Housekeeping supervisor, Kalaupapa Settlement

Testimony on the relationship between Mr. Workman and Ms. Cerny, and conversation with Guy Hughes on October 11, 2002, concerning poor working relationships among Park Service personnel. Correspondence/ confrontations between Ms. Cerny and Mrs. Kahilibiwa.

23) Jennifer Cemy
Cultural Anthropologist, Kalaupapa National Historical Park

Testimony to confirm her hiring her own mother as a volunteer for the National Park Service.

24) Laura Schuster
Hawaii Volcanoes National Park

Testimony concerning Mr. Workman's request for the re-announcement of the position of Cultural Anthropologist at Kalaupapa National Historical Park.

25) David Duffy
Pacific Cooperative Studies Unit, University of Hawaii

Testimony about his concerns, as Ms, Cerny's supervisor, over Mr. Workman and Ms. Cerny's relationship.

26) Stephen Tollefsen
Laborer, Kalaupapa National Historical Park

Testimony about Tom Workman entering Jennifer Cerny's apartment in the evenings.

27) Clarence Kahilihiwa
Resident, Kalaupapa Settlement

Testimony about Tom Workman walking from the direction of Jennifer Cemy's apartment toward his (Tom's) home mornings before dawn.

28) Gene Sheppeard
Airport Attendant, Kalaupapa Airport

Testimony about Tom Workman and Jennifer Cerny traveling together and displays of affection at the airport.

APPENDIX I

Memorandum

To: Kathy Hancock, Ecologist, Kalaupapa National Historical Park

From: Guy Hughes, Wildlife Biologist

Date: 08/15/2002

Subject: Notice of Termination during Probationary Period

This is a notice of my decision to terminate your employment with the National Park Service, effective August 30, 2002, in accordance with 5 CFR 315. The reason for your termination during your probationary period is the need for continuing supervisory involvement and intervention that is not acceptable for your position, Specifically:

—You were appointed on January 13, 2002, to the professional position of Ecologist, GS-408-9, at Kalaupapa NHP. The SF50, Notification of Personnel Action, which was provided to you, states: "Appointment is subject to completion of one year initial probationary period beginning 1/13/02."

—Your position description states: "At the GS-09 level the supervisor makes assignments by defining objectives, priorities, and deadlines and assists the employee with unusual situations which do not have clear precedents. Completed work is evaluated for technical soundness, appropriateness, and conformity to policy and requirements." Thus, particularly because of your academic background, I expected you to work independently to develop and prioritize a research needs list for the marine and aquatic biology issues facing the park; network and establish working relationships with key University of Hawaii and U.S. Geological Survey marine scientists with current projects on Molokai; demonstrate sound and objective decision making abilities; and assume a positive leadership role in working with others to plan and establish a marine program at the park, I communicated my expectations

to you verbally and in writing. I find, however, that you have made limited progress in all of these important areas.

—You have continually exhibited poor judgment and a negative attitude at work that at various times created an uncomfortable working environment for a volunteer, a contract employee, the park rangers, the superintendent, and for me, your supervisor. Some examples include:

—You had difficulty finalizing the dive plan, and you made unprofessional communication providing erroneous information to your peers regarding the process of establishing a dive safety plan and nominating a park dive officer, at the park.

—You were instructed in your performance plan to recruit, hire, and supervise a Student Conservation Associate or volunteer for the summer of 2002 to assist you with your program. Since you did not recruit for a volunteer, I recruited one and asked you to mentor and work with her on marine projects, the subject that most interested the volunteer. You failed to provide positive leadership to the seasonal volunteer. In fact, you alienated the volunteer, exhibited unprofessional behavior and poor judgment on a number of instances, and failed to successfully mentor or work with her after being instructed to do so on several occasions.

—You communicated and operated outside the supervisory framework in an unprofessional manner on several occasions. Over the course of the past three months you have written many memorandums and email messages that often focused and drew out negative aspects of events and issues rather than positively trying to resolve matters. Further, your choices to produce series of memorandums instead of identifying and focusing on important areas of work also indicate questionable or poor judgment.

Your actions and reactions to these and other situations have required my continual intervention, counseling, and follow-

up, which detracts from productive work being accomplished for the park. I do not believe our relationship will progress to an acceptable level, therefore, I have decided on this termination action.

If you allege that this action was based in whole or in part on your marital status or political affiliation, you have the right to appeal this action to the Merit Systems Protection Board (MSPB) under 5 CFR 315 Otherwise, this action is not appealable to the MSPB. You may not appeal an allegation of discrimination because of race, color, religion, sex, age, national origin, or physical or mental disability to the MSPB unless you also allege that the action was based in whole or in part on your marital status or political affiliation. In that event, you may appeal all allegations of discrimination to the MSPB.

If you file an appeal based on marital status or political affiliation, it should be filed with the Regional Director, Merit Systems Protection Board (MSPB), Seattle Field Office, 915 Second Avenue, Suite 1840, Seattle, WA 98174-1056. Your appeal must be received by the office of the MSPB no later than thirty (30) calendar days after the effective date of the termination action. The Board requires personal delivery during normal business hours, delivery by regular mail, by facsimile, or delivery by commercial overnight delivery service. A copy of the Board's regulations and Appeal Form is attached. Petitions of appeal may be in any format including letter form, but must contain the information specified on the Appeal Form.

This action is not subject to review under the Department of the Interior Grievance procedures (370 DM 771).

Should you allege that the action taken against you was based in whole or in part on discrimination because of race, color, religion, sex, age, national origin, or physical or mental disability, you may appeal the discrimination allegation through

the Bureau's discrimination complaint system under Part 1614 of the Equal Employment Opportunity Commission Regulations. To appeal under Part 1614, the allegation must be brought to the attention of the EEO officer or an EEO counselor within forty-five (45) calendar days of the effective date of this action.

If you have any questions concerning how to pursue an appeal, you may contact Lea Scow, Personnel Officer, Pacific Islands Support Office, 808-541-2693.

A Standard Form 50, Notification of Personnel Action, affecting your termination will be forwarded to you when available.

Please sign and date the enclosed duplicate copy of this letter to acknowledge that you have received it. Your signature does not mean that you agree or disagree with this notice and, by signing, you will not forfeit any of the rights mentioned. However, your failure to sign will not void the contents of this letter.

Attachments

1—MSPB Regulations (5 CFR Part 1201)

2—MSPB Form (OF 283)

I acknowledge receiving this document.

/s/ Kathy M. Hancock 8/19/02
Signature Date

APPENDIX J

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302 (b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office; the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion. The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently, if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel

practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302 (b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 (k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it

failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection; the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law,

(A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or

(B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate. If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the

agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16 (c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right

to have the facts subject to trial de novo by the reviewing court.

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the

party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

* * * *

5 C.F.R. § 315.806 Appeal rights to the Merit Systems Protection Board.

(a) *Right of appeal.* An employee may appeal to the Merit Systems Protection Board in writing an agency's dec. .on to terminate him under §315.804 or §315.805 only as provided in paragraphs (b) and (c) of this section. The Merit Systems Protection Board review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) *On discrimination.* An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(c) *On improper procedure.* A probationer whose termination is subject to §315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based

on discrimination because of race, color, religion, sex, or national origin; or age (provided that at the time of the alleged discriminatory action the employee was at least 40 years of age); or handicapping condition if the individual meets the definition of "handicapped person" as set forth in regulations of the Equal Employment Opportunity Commission at 29 CFR 1613.702(a). An appeal alleging a discriminatory termination may be filed under this subsection only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

[33 FR 12418, Sept. 4, 1968, as amended at 40 FR 15380, Apr. 7, 1975; 44 FR 48951, Aug. 21, 1979; 55 FR 29339, July 19, 1990]

* * * *

Federal Circuit Rule 36. Entry of Judgment—Judgment of Affirmance Without Opinion

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence supporting the jury's verdict is sufficient;

(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law.